

Special Education Advisory Council Ad Hoc Committee

on

# School Health Services as Special Education Related Services

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Special Populations Office

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The *School Health Services as Special Education Related Services* Technical Assistance Document was developed to assist school districts and parents when making decisions about serving children who qualify for special education services and need health care as a related special education service. This document became a reality because of the dedicated committee and individual efforts of . . .

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# ***School Health Services as Special Education Related Services***

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# ***Introduction and Overview***

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In the past decade, advances in medicine have resulted in an increased number of children with special health care needs attending public schools. Health care technology has increased the survival rate of low birth weight infants, children with chronic illness, children with congenital anomalies and children who have survived traumatic injuries. Some of these children have technology-assisted needs (such as mechanical ventilation tracheostomies, oxygen); supplemental nutrition needs; medication; or other special health care needs which must be addressed during the school day. An even greater number of children have long-term chronic medical conditions such as diabetes, asthma, anemia, hemophilia, epilepsy and leukemia. Some of these conditions require daily management in the school setting, while other conditions may require only intermittent management or acute care procedures on an emergency basis in the school setting.

Concern regarding provision of services for these children in the school setting prompted the development of this document. It is intended that the document will provide assistance to parents, teachers, administrators and health care professionals in developing individualized health care plans for children who have specialized health care needs which must be addressed during the school day. This document addresses the process for the development of individualized health care plans and the training of school personnel. Specific focus will be on health care planning and services as a special education related service.

The role of the parent in the delivery of services to the children with special health care needs also deserves special mention. Parents need to be integrally involved in all aspects of the development of an individualized health care plan. Parents are knowledgeable about their child's medical condition and have a great deal to offer during the planning process. When appropriate, parents should also be involved in the development of a personnel training plan. Indeed, parent involvement is crucial to the success of all aspects of planning and implementation.

It is recommended that an individualized health care plan be developed for any child who has a special health care need which must be addressed during the school day. The extent of the health care plan will be determined by the child's unique health needs. Special education students' related service health care plans will be part of the Individual Family Service Plan (IFSP) for children birth to age 3 and part of the Individual Education Program (IEP) for children age 3 to 21.

## ***Defining the Population***

Education and health care professionals use a variety of terms to describe children with chronic or special health conditions. These children may be referred to as children who are chronically ill, medically fragile, technology dependent, or other health impaired. Each of these terms have overlapping features.

"Chronically ill" typically means a child whose condition is not temporary and results in decreased strength, vitality and alertness. Examples of chronic conditions often seen in children are asthma, diabetes, rheumatoid arthritis, cancer or epilepsy. Children who have a chronic illness often present fluctuating states of health care needs. The condition may adversely affect the child's educational performance and require supervision to maintain, regulate or intervene.

In Nebraska, the term "other health impaired" is used in the educational setting to identify a student who requires special education because of a health condition which results in limited strength, vitality, or alertness due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle-cell anemia, hemophilia, epilepsy, lead poisoning, leukemia or diabetes that adversely affects a child's educational performance.

A "technology dependent" child is a child who needs both a medical device to compensate for the loss of a vital function and substantial and ongoing nursing care to avert death or a further disability. The Office of Technology Assessment in Washington, D.C. has identified four separate populations, distinguished from one another by their clinical characteristics, that could be used to describe technology dependent children:

- Group I: Children dependent at least part of each day on mechanical ventilators;
- Group II: Children requiring prolonged intravenous administration of nutritional substances or drugs;
- Group III: Children with daily dependence on other device-based respiratory or nutritional support, including tracheotomy tube care, suctioning, oxygen support or tube feeding; and
- Group IV: Children with prolonged dependence on other medical devices that compensate for vital body functions who require daily or near daily nursing care. This group includes:
  - ◆ Children requiring cardiorespiratory monitors;
  - ◆ Children requiring renal dialysis as a consequence of chronic kidney failure, and

- ◆ Children requiring other medical devices such as urinary catheters or colostomy bags as well as substantial nursing care in connection with their disabilities.

"Medically fragile" typically means a child who has a life-threatening physical condition. A medically fragile technology dependent child is a child who requires a medical device to compensate for the loss of a vital body function.

In this document, the terminology "student or child with special health care needs" is used to be inclusive of all children with special health care needs regardless of their educational placement. Children with special health care needs may or may not require special education. The decision as to whether a child qualifies for special education is made by a multidisciplinary evaluation team in accordance with eligibility requirements identified in Section 006 of 92 NAC 51 (Rule 51), the special education rule. It is not the intent of this document to identify who or who may not be disabled under Section 504 of the Rehabilitation Act of 1973, the Individuals with Disabilities Education Act (IDEA), the Americans With Disabilities Act (ADA), or 92 NAC 51 (Nebraska's special education rule). It should be noted that in Nebraska, 92 NAC 51 is used for special education verification as well as all special education processes, and meets all of the requirements of the IDEA regulations (34 CFR §300). Special education references in this document will be from Nebraska's rule unless otherwise noted.

***Definition of Children  
With Special Health  
Care Needs***

Children with special health care needs are those children who require individualized health care intervention during the school day to enable participation in the education program. This population includes children:

- ◆ Who may require administration of medication;
- ◆ Whose medical condition is currently stable but may require routine or emergency medical procedures; or
- ◆ Who use a particular medical device which compensates for the loss of the vital body functions.

***Individuals with  
Disabilities Education  
Act (IDEA)***

The regulations adopted to implement the Individuals with Disabilities Education Act (IDEA) define school health services to mean "*services performed by a nurse or other qualified person*" and medical services to mean "*services performed by a physician.*" These regulations (34 CFR §300) distinguish between a school health service and a medical service on the basis of who is qualified to perform the services. Schools are required to provide school health services as a related special education service to

children who qualify under IDEA and in Nebraska under 92 NAC 51. Schools are required to pay for medical services only when the services are necessary to determine the need for special education and related services.

To qualify for special education health care related services: (1) the child must be qualified under IDEA (92 NAC 51 in Nebraska); (2) the service must be necessary to aid a child with a disability to benefit from special education; and (3) the service must only be provided if it can be performed by a nurse or other qualified person, but not a physician.

### ***Birth to age 5***

In 1986 the federal law (Part B of IDEA) which provided education for children with disabilities was amended to extend the availability for free appropriate special education services to 3 and 4 year olds. These amendments are known as PL 99-457. In addition, the amendment added a new section, Part H, which described the availability of federal dollars to states who wished to extend services for children with disabilities from birth to age three.

Part H specified, however, that if a state wanted to do this and receive any federal dollars they must abide by specific federal guidelines which included a state coordination council, the development of an infant and family service plan (IFSP), and provide service coordination to families. The program and services must be family-centered and community based.

Services for Part H include the following: audiology, service coordinator, family counselor/training, health services, medical services, nursing, nutrition, occupational therapy, physical therapy, psychological services, social services, special education, speech/language pathology, and transportation. Part H stress multiple agency involvement, and does not assume that school districts will be responsible for all needed services.

### ***Section 504 of the Rehab. Act of 1973***

All students qualified for special education and related services under the Individuals with Disabilities Education Act (IDEA) and Nebraska's 92 NAC 51 are also qualified for the protections of Section 504 of the Rehabilitation Act of 1973. In addition to these special education students, Section 504 also protects any student of school age who (1) has a physical or mental impairment which substantially limits one or more major life activities such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working; (2) has a record of such impairment; or (3) is regarded as having such impairment.



Section 504 requires that a school district make reasonable accommodations for a student with disabilities to permit that student an equal opportunity to participate in educational and related activities. For additional information on Section 504 of the Rehabilitation Act of 1973 contact the Nebraska Department of Education Special Populations Office, 402/471-2471, and request a copy of *Section 504 of the Rehabilitation Act of 1973 / Attention Deficit Hyperactivity Disorder / Americans With Disabilities Act Technical Assistance Document*.

***Recommended Action For  
School Districts***

Each of the Acts require that school districts follow certain procedures to determine when a child with disabilities requires the provision of school health services. Each Act requires an evaluation. When a medical condition is interfering with the child's ability to take part in his or her education program, an evaluation is required to determine what supportive services are necessary to permit the child to participate.

The forum required to make decisions regarding appropriate education services for verified special education children is the Individual Family Service Plan (IFSP) for children birth to age 3 and the Individual Education Program (IEP) for children age 3 to 21.

For Section 504 students, a team of persons knowledgeable about the child's situation and accommodating alternatives meets to make the determination. Although a written plan is not required under Section 504, it is recommended that a written record be maintained of the alternatives considered and the reasons for the plan decided upon. Completion of an individual health care plan (IHCP) would address this concern.

**Nebraska Nurse Practice  
Act (Neb. Rev. Stat. 71-  
1,132.04 to 132.53)**

This Act defines the qualifications of a nurse, the practice of nursing, and the standards for the practice of nursing in Nebraska. The practice or attempted practice of professional or practical nursing, or the use of any title to indicate that such a person is practicing professional or practical nursing without a license is unlawful. The practice of nursing by a registered nurse means assuming responsibility and accountability for nursing actions which include, but are not limited to:

- a. Assessing human responses to actual or potential health conditions;
- b. Establishing nursing diagnoses;
- c. Establishing goals and outcomes to meet identified health care needs;
- d. Establishing and maintaining a plan of care;
- e. Prescribing nursing interventions to implement the plan of care;
- f. Implementing the plan of care;
- g. Teaching health care practices;
- h. Delegating, directing, or assigning nursing interventions that may be performed by others and that do not conflict with the Act;
- i. Maintaining safe and effective nursing care rendered directly or indirectly;
- j. Evaluating responses to interventions;
- k. Teaching theory and practice of nursing;
- l. Conducting, evaluating, and utilizing nursing research;
- m. Administering, managing, and supervising the practice of nursing; and
- n. Collaborating with other health professionals in the management of health care.

Minimum standards for nursing practice, as defined by the state Nurse Practice Act, and *professional* standards of nursing practice established by professional nursing organizations, exist to guide registered nurses in the provision of nursing services in the school setting. It is the combination of the legal and professional regulation of practice that provides the framework for clinical practice. In determining which interventions, duties, and responsibilities are professional in nature and which are appropriate for unlicensed assistive personnel to perform, Nebraska state laws, rules, regulations, and professional standards of nursing practice should be consulted.

Questions regarding the Nurse Practice Act or professional standards of nursing practice should be directed to the Board of Nursing (402-471-2115) or state School Nurse Consultant (402-471-0160).

***Developing A Policy  
Governing The Provision  
Of Nursing  
Interventions And  
Health Related  
Activities***

School board policies governing the provision of health related services to children must assure that services are provided in a manner consistent with law and standards of professional practice. Prior to the development of policies, districts would be well advised to read and discuss the Appendices of this document titled "Delegation of School Health Services To Unlicensed Assistive Personnel" and "The Nursing Profession's Role Related to Unlicensed Assistive Personnel (UAP)." Policies should include:

- ◆ Guidelines to determine whether the service needed is one which the district is required to provide (e.g., intermittent nursing services; services that can be provided by an unlicensed assistive personnel (UAP) --paraprofessional-- with minimal training and supervision; or a routine health service which a school nurse provides as part of routine duties). If constant care of a health professional is required, other sources for funding the health related services needed to enable the student to attend school should be fully explored (e.g., Medicaid or private insurance -- See Detsel V. Sullivan, 895 F.2nd 58[2nd Cir.1990] in the Appendices of this document.)
- ◆ Procedures to assure that health-related activities performed in school settings are provided by qualified and properly trained individuals, including those services provided on school transportation vehicles.
- ◆ Procedures to provide for the appropriate training and supervision for any individual asked to provide health-related services.
- ◆ Delineation of the duties to include that a school nurse (RN) is:
  - ✧ Responsible for determining whether the health related activity needed by a child may only be performed by a registered nurse or is one which may be safely delegated by the licensed registered nurse to a specific unlicensed individual whom the RN trains and monitors;
  - ✧ Responsible for the supervision and monitoring of all legally required nursing interventions;
  - ✧ Responsible for determining prior to delegation the training required to enable unlicensed assistive personnel to safely provide health related activities;
  - ✧ Responsible for selecting who will be performing what health related activities, the level of supervision and monitoring required, and how competency and student outcomes will be evaluated; and

- ✧ Responsible for determining on a periodic basis that health-related activities continue to be appropriate and are being performed in accordance with the individualized health care plan
- ◆ Procedures to ensure delegation of health related tasks to unlicensed assistive personnel is consistent with their job description, does not interfere with their ability to perform other assigned duties, and does not interfere with the instructional program provided to other students in the classroom.

Questions concerning the provision of health services in the school setting may be directed to the state School Nurse Consultant at the Nebraska Department of Health, 402/471-0160 .

***Article 33—The Special  
Education Act (Neb.  
Rev. Stat. 79-3301 to  
79-3370)***

Article 33 in the Nebraska Revised Statutes defines special education and entitles all children a meaningful educational program in the State of Nebraska, regardless of physical or mental capacity. The statutes also allow for state reimbursement of a portion of the special education costs to local school districts. This statute is a birth to age 21 mandate.

# State and Federal Regulation Issues

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Under IDEA as well as Nebraska regulation, a child's eligibility for special education and related services is contingent upon meeting the criteria for eligibility. The child must be identified as having one, or a combination of, the disabling conditions listed in 92 NAC 51 (Nebraska's special education rule), and that disability must adversely affect the child's educational performance.

## **Children with Disabilities**

92 NAC 51-003.08 states: "*Children with disabilities shall mean those children who have been verified by a multidisciplinary evaluation team as per 92 NAC 51-006 as children with autism, behavior disorders, deaf-blindness, hearing impairments, mental handicaps, multiple disabilities, orthopedic impairments, other health impairments, specific learning disabilities, speech-language impairments, traumatic brain injury, or visual impairments, who because of these impairments, need special education and related services.*"

If a child with a health-related condition does not have any other disability as listed, the evaluation should focus on whether the child may be eligible for special education with a verification of other health impairments.

## **Other Health Impairments**

Other health impairments is defined in 92 NAC 51-003.08H and states: "*Other health impairments shall mean having limited strength, vitality or alertness, due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes, which adversely affects a child's development or educational performance.*"

## **Multidisciplinary Evaluation Team (MDT)**

In Nebraska it is the responsibility of the school district's multidisciplinary evaluation team (MDT) to evaluate a child's eligibility for special education and related services. The child must be assessed in all areas related to the suspected disability, including where appropriate health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status and motor abilities (92 NAC 51-006.03D). Medical services may only be provided for diagnostic or evaluation purposes.

A key component of this multidisciplinary evaluation for a child with a health related condition is a health assessment that may be conducted by the school nurse. Based on this assessment, the school nurse identifies those health issues that are relevant to the child's educational progress. If a child with health related disabilities is determined eligible for special education and related services under 92 NAC 51, an individualized health care plan (IHCP) with specific behavioral objectives, interventions and evaluation criteria should be initiated by the school nurse as part of the child's individual education program (IEP) or the individual family services plan (IFSP) team process, and incorporated into the IEP or IFSP.

### **Section 504 Issues**

If the multidisciplinary evaluation team evaluates and finds that a student's health issues do not adversely impact educational performance, the child is not eligible for services under 92 NAC 51. The student may, however, be considered disabled for purposes of §504 of the Rehabilitation Act of 1973.

Section 504 is a basic civil rights statute which prohibits discrimination on the basis of disability. A person who is considered disabled for purposes of §504 protections is any person who... "*(I) has a physical or mental impairment, which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.*" [34 CFR 104.3(j)]

Qualification as a person with a disability under §504 is much broader than the eligibility requirements under the Individuals with Disabilities Education Act (IDEA) and 92 NAC 51. While §504 requires that the condition substantially limit a major life activity, it may or may not adversely affect the student's educational performance. An example would be a student with cystic fibrosis who is able to progress academically with his peers, but requires respiratory therapy once a day in order to access his regular school program

# ***Medical Services or School Health Services ?***

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Medical services and school health services are both included in the federal and state special education definitions as related services.

## ***Related Services***

*"Related services shall mean transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training." (92 NAC 51-003.39 and 34 CFR 300.16)*

A recent decision by the U.S. Court of Appeals for the Sixth Circuit, *Neely v. Rutherford County School*, 1995 FED. App. 0323P (6th Circuit) continues to raise questions about the provision of "medical" services by "non-medical" personnel as well as to the nature of medical and health-related services under the IDEA.

The Circuit Court decision in *Neely* ruled that the provision of a full time "private duty" nurse was a service falling under the "medical services" exclusion of related services under the IDEA. The circuit court agreed that an undue burden was created for the school district because of the need for constant care and the potentially life threatening consequences. The undue burden in this case derives from the nature of the care involved. The ruling coincides with several other post-Tatro decisions holding that full-time nursing care for students with tracheotomies fall under the medical services exclusion of the IDEA. *Neely* distinguished the case of *Hawaii Department of Education v. Kathryn D. exrel. Kevin and Roberta D.*, EHLR 555.276 (9th Cir. 1983), a case where the 9th circuit held that the IDEA required a school district to pay for the tracheotomy services of a student with a disability, on the grounds that the suctioning in that instance was only necessary two or three times a day and there was no hint that the child faced life threatening consequences in the event that the routine care was not properly and promptly administered. In the Appendices of this document see *Detsel v. Auburn Enlarged City School District* 1987 EHLR 558.395; *Bevin H. v Wright* 1987 EHLR 559.122; *Granite School District v. Shannon M.*, IDELR 772; *Hawaii*

Department of Education v Kathryn D. exrel. Kevin and Roberta D. EHLR 555.276 (9th Circuit, 1983); and Irving Independent School District v Tatro, 468 U.S. 883 (1984).

### **Medical Services**

Medical services are not "related services" under the IDEA unless they are conducted for diagnostic or evaluative purposes relating to the provision of special education. Under the IDEA and Nebraska Rule 51, the distinction between health services which must be provided to children with disabilities as part of the special education process and those which are excludable medical services, are not clear. Nor have the courts completely resolved these questions.

In recent requests (Flood and Schoonover, February 1996) for interpretation and clarification to the Nebraska Department of Education Special Populations Office regarding the provision of constant full-time nursing services for children with life threatening tracheotomy care, NDE referenced the following:

*"IDEA and Rule 51 require that decisions concerning which services must be provided as part of a Free Appropriate Public Education (FAPE) to be determined through the individualized planning process. Because individuals closest to the child (i.e. parents, educators, and the child when appropriate) are in the best position to make program decisions for individual children, both IDEA and NDE Rule 51 specify procedures to be used and general guidelines in determining appropriate programs, but do not specify which services must be provided for individual students or groups of students."* (Response Sherman and Wierda March 25, 1996)

The issue which commonly arises in Nebraska schools when dealing with medically fragile children involves which school personnel must administer these procedures. Procedures are performed often by teaching and support personnel who are called upon for catherization, tracheotomy care, glucose testing, dispensing of oral medication, tube feeding, etc. Many teachers and paraeducators are beginning to share the view that when school districts extend their responsibilities in this direction, they are being asked to cross an impermissible line from teacher to nurse.

Since the regulation definition of "school health services" as those services "provided by a qualified school nurse or other qualified persons" is extremely broad, this ad hoc committee believes additional clarification by the State of Nebraska is required. As the number of children with special health care needs in school increases, the need for greater clarity regarding role delineation also increases. Though the



Nebraska Nurse Practice Act provides for proper delegation, not all school personnel are aware of the procedures associated with proper delegation.

The following role indicators are presented for physicians and school administrators when providing school health services for children with special health care needs in public schools.

***Role of Physician***

1. Providing medical examinations for diagnostic purposes.
2. Making recommendations about appropriate therapeutic measures and individualized prescriptions and protocols for procedures to be performed at school.
3. Reviewing the IEP/Individualized Health Plan (IHP), and assessing whether health related services are appropriate, and sufficiently comprehensive.
4. Participating as a member of the multidisciplinary teams/IEP either directly or through written/verbal reporting.
5. Interpreting medical information.
6. Responding to questions posed by school support teams.

***Role of the Administration***

1. Overseeing the child's educational program to ensure that the health needs of the child in the school setting are appropriate.
2. Providing adequate personnel to meet the child's education, transportation, and health care needs.
3. Assuring that adequate provisions are provided to assume the liability involved when children with special health care needs are served in education environments.
4. Maintaining overall responsibility for the administration, coordination, and evaluation by appropriate personnel of the effectiveness of the special health care needs provided to children.

***Questions to Ask***

Case law has given school districts several questions that need to be addressed when deciding whether a service is a medical service or a school health service. These questions become critical because they determine if the school district is fiscally responsible for the provision of the service.

***Evaluation***

- ◆ Is the child eligible for special education services as per 92 NAC 51-006 (Nebraska special education rule)?
- ◆ Is the service needed an evaluation service conducted by a physician to assist in the determination of eligibility for special education and related services? If the answer is yes, the school district by definition of medical services as a related

service would be fiscally responsible for the service performed by the physician.

***Medical Service  
Exclusion***

- ◆ Once the eligibility for special education and the care services have been determined — Who is authorized to provide the care? The Nebraska Nurse Practice Act will be very helpful in this determination. If a physician is required to provide the care, this service is not a school health service and would not be the fiscal responsibility of the school district.

***Nature of the Service***

- ◆ Is the service requested similar to those provided by the school nurse to children without disabilities? If it is, the school district will most likely be fiscally responsible.
- ◆ Is the service a "supportive service" required to assist the child to benefit from special education? If so, the school district will most likely be fiscally responsible. This question refers to the definition of a related service.

***Burden to the District***

- ◆ How do the gains for the child measure up to the burden imposed on the district?

## Questions and Interpretations

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**Is the local school required to supply a portable generator as a precaution against power failure?**

Provision of a portable generator may be a reasonable accommodation to the child's medical condition. The decision needs to be made on an individual basis by the planning team.

**If a child requires the one-on-one care of a nurse to attend school, whose responsibility is it to pay for and hire the nurse; the school's or the parent's?**

Usually, schools are not required to provide the constant, continuous care of a one-on-one nurse for a child. If a child requires such extensive medical services, it is usually provided through some other funding source such as Medicaid or private insurance.

According to the October 26, 1992 Program Policy Memorandum Medicaid Services #1-93, AABD #1-93, ADC #1-93 from the Nebraska Department of Social Services, *"Clients who require and are authorized to receive Home Health nursing or private-duty nursing services in the home, hospital, or nursing facility setting may use their approved hours outside of those settings during those hours when their normal life activities take them out of those settings. This clarification does not require the Medicaid program to authorize any additional hours of nursing service beyond those normally permitted under the program. If a client wishes to receive Home Health nursing services or private-duty nursing services to attend school or other activities outside the home, but does not need Home Health or Private-Duty nursing services in the home, hospital, or nursing facility setting, there is no basis for authorizing additional hours of service beyond those normally allowed under the program."*

## ***Questions and Interpretations (Con't)***

### **Is the school district responsible to pay for physician's services?**

Unless otherwise agreed, schools are responsible for a comprehensive education evaluation which may include the evaluation services of a licensed physician.

### **Under what circumstances might this occur?**

School personnel may request already documented medical results which may lead to a child's need for special education and related services. Examples include:

- ◆ Payment of a nominal fee to a health care provider to satisfy Medicaid in the Public Schools (MIPS) requirements.
- ◆ The utilization of a physician as part of a MDT to conduct a variety of medical diagnostic tests to substantiate a medically related disability
- ◆ Payment of a fee to an ophthalmologist to determine a disability in the area of vision
- ◆ Payment of a fee to an ear, nose and throat physician to substantiate a severe hearing loss or evaluation of habilitation of hearing that results in the need for special education
- ◆ Payment of a fee to a psychiatrist to diagnose a student with a severe emotional/disturbance/behavior disorder
- ◆ Payment of fee for the physician to process paperwork/report writing to assist in the diagnosis of a health impairment
- ◆ Payment of a consulting fee for evaluation purposes to assist in developing an individual education program for children with orthopedic impairments, asthma, diabetes, epilepsy and other children with chronic health conditions who require special education

# ***Child Identification and Development of the Individual Health Care Plan***

## ***Questions and Interpretations (Con't)***

**What is the responsibility of the school districts to involve physicians in the diagnosis of Attention Deficit Disorder (ADD)?**

Children who have been diagnosed by physicians with ADD may or may not be eligible for special education under the IDEA or Section 504. Under the IDEA certain children with ADD may not be eligible for services because they do not require special education and related services. In meeting their obligations to provide a free appropriate public education (FAPE) to such students under Section 504, districts could require the provision of regular education and related aids and services such as regular class accommodations, as determined appropriate for the child. Though school districts should carefully consider all diagnostic information provided by parents through their physicians, school districts, are not required to apply IDEA or Section 504 criteria unless a child is evaluated, determined to have a specific impairment, and need regular education accommodations or special education and related services because of that impairment. The common standard under both the IDEA and Section 504 is that the child's educational performance is adversely affected by the impairment, or under Section 504, substantially limits a major life activity - usually, learning.

**Can a school district contract with physician to serve on an MDT/IEP team to perform a medical/health related service?**

Yes, both federal and state statutes recognize this practice as a potentially necessary role in the provision of special education and related services.

**When should a school district include a licensed physician to determine a child's medically related disability that results in the need for special education and related services?**

School personnel may need the assistance of a licensed physician as part of the multidisciplinary/Individual Education Program teams when consulting with other team members in the diagnosis/evaluation and planning phases of the special education process.

The identification of a child having special medical and health care needs is often completed years prior to the child's enrollment in school. Many children are identified at birth or shortly thereafter by their physician. In some cases, a child who originally did not have special health care needs upon school enrollment may later require an individualized health care plan as a result of the onset of a disease, a traumatic brain injury, or other physical condition which was not previously exhibited. In most cases, children with special health care needs will have a wealth of assessment and medical health care information which may be of benefit in planning health care and educational programming in the school.

Public education services are mandated for all children, including those with special health care needs. Not all children who have school health care needs require special education. However, they do require consideration and planning to determine the need for special services or reasonable accommodations. The entry of a child with special health care needs into the school setting presents a challenge to the family, school staff, and community. A collaborative effort by all is needed to accomplish a safe, healthy, and educationally sound program for all involved.

In order to ensure a safe educational environment and a smooth transition from the community setting to school for children with special health care needs, it is necessary that a school have a well-defined and organized process for identifying, evaluating and health care planning. It is also important that parents, the school administrator, nurse, teacher and other appropriate school personnel are thoroughly familiar with the individualized health care planning process.

***Child Find and Student  
Identification***

Identification of children with special health care needs is an integral part of a school's child find program and may be accomplished in a variety of ways. In most cases, parents inform the school district at the time of enrollment that their child has a special health care need.

To ensure that children in need of special health care services during the school day are identified, districts should have a process whereby child health information is periodically reviewed. In addition, the school should have a referral procedure in place and should inform district

personnel and parents of the procedure to help ensure that all children with special health care needs are identified.

### ***Referral Procedure***

The referring person (parent or any school personnel) should complete a referral form and give the completed form to the building administrator or school nurse. For a child who may require special education services, this may be part of the student assistance team or the multidisciplinary evaluation process.

Prompt referral and identification assist the school in the development of an appropriate health care plan for the child. In some cases, the nature of the child's health care needs will prompt an immediate referral to special education if that has not already been completed.

### ***Special Health Care Assessment Procedure***

Health assessment refers to the collection and analysis of information or data about the child's health situation to determine the child's state of health, patterns of functioning, and need and management for health services in the school setting. The health assessment is conducted by the nurse and consists of data collection, data analysis and nursing diagnosis. The extent of information (health assessment) gathered by the nurse will be determined by the child's health care needs.

The completed referral form and the child's school health information should be reviewed by the nurse. The nurse should also check the child's file to determine if the child has a verified special education disability, or if the child has been referred for a special education multidisciplinary team evaluation. If either is the case, it is recommended that the nurse consult with special education personnel and building administrator prior to contacting the parent. This will assist in coordination of communication between school and home and help ensure that evaluations conducted are comprehensive and address all areas of the child's suspected disability.

Following the above review, the nurse should do the following:

- ◆ Schedule a meeting with the parent for completion of pertinent background information
- ◆ Obtain written parent permission to complete a special health care evaluation. For a child with a verified disability or in the process of a special education multidisciplinary team evaluation, the request for a special health care evaluation may be part of the written parent notice for special education evaluation.
- ◆ Obtain written release of information consent from the parent
- ◆ Contact the child's primary physician to discuss the child's special health care needs

- ◆ Obtain a copy of the physician's order or an authorization for potential special health care services to be performed at school
- ◆ Complete a written summary of the child's specialized health care needs. For a potential child with a disability this summary would become part of the multidisciplinary evaluation team report.

***Development Of The  
Individual Health Care  
Plan***

The individual health care plan is child specific. The plan identifies the child's health needs and the health care actions which will take place during the school day to address those health needs.

Following completion of the health care assessment, a health care planning meeting should be held to develop the child's individualized health care plan and address educational planning needs, as appropriate. For a child who is not receiving special education services or who has not been referred for special education evaluation, participants at the meeting would generally include the parent, nurse, school administrator and primary teacher. Depending on the health care needs of the child, the school may wish to invite the physician and other appropriate personnel to participate.

The goals of the health care planning meeting are to :

- ◆ Familiarize team members with the child's health care needs;
- ◆ Identify any concerns of the parent or staff related to the child's special health care needs;
- ◆ Identify the special health care needs of the child which must be provided for during the school day;
- ◆ Identify special equipment (if any), and arrangements for provision, maintenance and storage of the equipment;
- ◆ Identify medications to be given, if any, and under what circumstances;
- ◆ Identify the personnel who will provide for the special health care needs of the child and the training the personnel will require, if any;
- ◆ Identify what modifications, if any, will be required for the regular education program to accommodate the child's special health care needs and the strategies for implementation of the modifications;
- ◆ Identify the service delivery options to be used when the direct care provider(s) of the child's special health care needs is absent;
- ◆ Determine the information and training needs of teaching personnel as they relate to the special health care needs of the child; and



- ◆ Identify any transportation needs of the child and the need for training of transportation staff.

Each child with special health care needs is unique. The assessment procedure and the individual health care plan are developed accordingly. For example, a child who requires only the administration of medication during the school day may not require as extensive health assessment or individual health care plan as a child who has more extensive needs such as a ventilator.

### ***The Individual Health Care Plan and Special Education***

If a child with special health care needs has been referred to special education or has already been identified according to 92 NAC 51 as a child in need of special education, the nurse should be part of the multidisciplinary evaluation team and provide a written report for the multidisciplinary evaluation team report.

The nurse should be included as a participant on the individual family service plan (IFSP) for children birth to age three and the individual education program (IEP) team for children age three to age twenty-one. The child's health care needs should be addressed as part of the IFSP or IEP meeting. The child's IFSP or IEP must have the following information documented:

- ◆ Identify "school health care" as a related service;
- ◆ Identify the dates when the school health care service will begin and when it will end; and
- ◆ Include in the current level of performance a summary of the child's current health status as it relates to the child's special education program.

### ***Individual Health Care Plan Review***

The child's individual health care plan should be reviewed as often as necessary. However, it is recommended that the plan be reviewed no later than sixty (60) days following the child's initial placement in school. At this time, the health care planning team (IFSP or IEP team for the child receiving special education) should review the plan for any changes that may have occurred since the plan was implemented or for any issues that were unforeseen at the time of implementation.

Thereafter, each child's individual health care plan must be reviewed at least annually. For the child with disabilities, this review should be conducted as part of the child's IFSP or IEP meeting. Any changes in the child's health care status would require a review of the individual health care plan.

### ***Pre-Admission School Visit***

For a child whose special health care needs require special equipment and extensive health care services, it is recommended that, prior to the child's first day at school, the child, parent(s), nurse and direct health care providers meet at the school to review any changes in the individual health care plan including:

- ◆ Location of health care area and emergency equipment,
- ◆ Storage of daily supplies and medications, and
- ◆ Location of electrical outlets and telephones.

If a child transfers to a different school building in the same school district, it is important that the individual health care plan information be reviewed with appropriate staff.

When appropriate, community resources such as the local fire and rescue squad, power company, phone company, etc., should be notified to alert them of the need for priority consideration for the child in the event of an emergency, such as power failure, etc.

### ***Emergency Procedures Plan***

Any child who may require emergency services at school based upon their unique health care needs should have an emergency procedure plan. The emergency plan should include:

- ◆ Child specific medical emergencies (specific signs of distress should be defined);
- ◆ Designated personnel in the community (fire, police, hospitals, ambulance, and any other emergency departments) should be notified/consulted when the child with special health care needs is attending school;
- ◆ Designated personnel in the school (school nurse, back-up personnel) who have been trained to deal with the emergency;
- ◆ A summary of the child's medical condition and needs should be on file at the local hospital emergency room, if indicated;
- ◆ The preferred hospital emergency room identified in case of the need to transport;
- ◆ A written plan with emergency contacts for family, physician and emergency personnel (post telephone numbers in various locations);
- ◆ A formal, documented procedure to review the emergency plan with all personnel on a regular basis.

### ***Service Options***

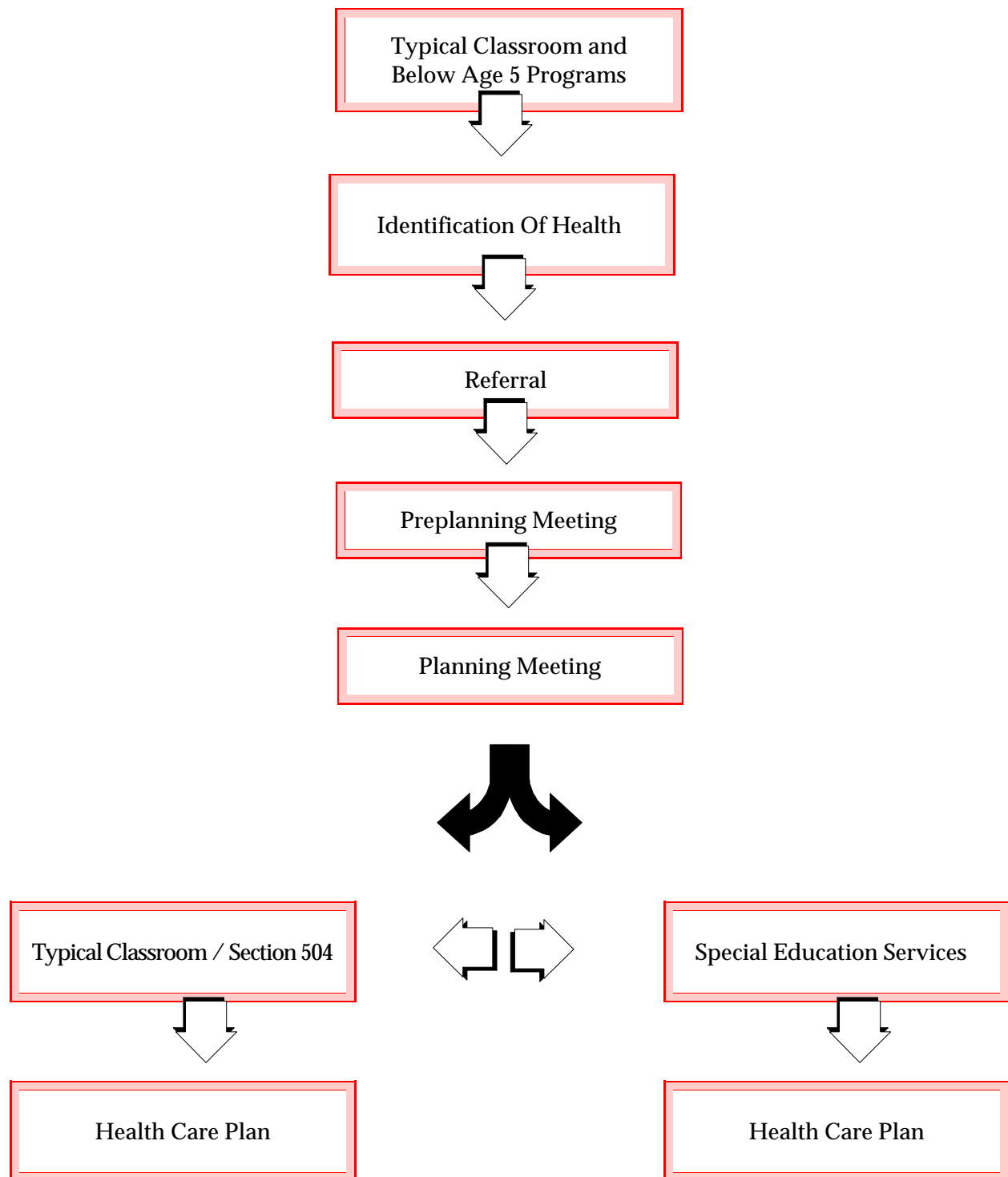
The above procedures could lead the child down a variety of service paths, depending upon his/her unique needs. For school age children, there are basically two service options, and any combination of the two could occur: 1) regular classroom; and 2) special education classroom. An

additional out of school option may be homebound instruction or hospital instruction.

In the majority of cases, the child will be served by a combination of regular education, Section 504, and/or special education. The health care plan will vary with each child and could include an emergency plan, transportation plan, and arrangements for staff training. The important issue is to educate the child in the least restrictive environment. The following flow chart details the service options for child identification and services.

## ***Service Option Flow Chart***

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## ***Questions and Interpretations***

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**Is it permissible to give the name of the child to the power company, telephone company or emergency services agency when alerting them as to the potential need for emergency services?**

No. The agencies do not need the child's name, only that there is a child in the school who may require emergency medical services, the nature of the health condition, and services which may be required in case of an emergency.

**Are parents responsible for maintenance of medical equipment?**

Yes. However, the school has a responsibility to inform the parent if district employees become aware of problems with the equipment. The district is responsible for the cost of maintaining equipment provided by the school district.

**Under what circumstances should the parents be notified of changes in a child's health condition?**

Parents should be notified of changes in a child's condition. This varies with each child and should be discussed during development of the health care plan. Regular communication from the school to the parent is encouraged.

**When a child experiences changes in his or her health condition, who is responsible for making adjustments in the educational program?**

The district's educational planning team is responsible for making adjustments in the educational program (IEP or Section 504 plan) when a child's health condition changes. It may be appropriate for a nurse to participate in the meeting to provide relevant health information.

**Is it necessary to have a physician attend a health care planning meeting?**

It may be desirable in some cases, but it is not required. Physician input can be gained in a variety of ways; written reports, prescriptions or other written communications. Although verbal information may be used, written information provides less opportunity for miscommunication and error.

**Is the school obligated to provide an extended school year program for a child who has a chronic health condition and who has missed a great deal of school?**

Maybe. If the child is protected under Section 504 or IDEA, provisions of an extended school year may be required as part of an IFSP, IEP or as a reasonable accommodation to the child's health condition.

## ***Questions and Interpretations (Con't)***

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**Does a child with special health care needs or a medical diagnosis of a health condition automatically qualify for special education?**

No. A child study team must determine if the child meets the eligibility requirement for special education. Criteria for eligibility can be found in 92 NAC 51-006 (Rule 51). Most children with special health care needs will be covered under Section 504 and entitled to reasonable accommodations, if required, to meet their health care needs.

**Is a health care plan required by federal or state regulation ?**

No. It is recommended as good practice.

**Are health care goals and objectives required on a child's IEP?**

Goals and objectives are required on the child's IEP only if the child's educational plan addresses goals for the child to develop independence in addressing his/her own health care needs.

Transportation should be addressed as part of the assessment and planning process. More often than not, child with special health care needs require special adaptations in regular transportation to accommodate specific health conditions and to transport essential equipment.

When a child with special health care needs requires health care considerations as part of regular or special transportation provisions, appropriate transportation staff may need to be notified. It is desirable that a member of the transportation staff attend meetings for the development of the individualized health care plan. If this is not possible, an appropriate member of the health care planning team should discuss the child's needs with transportation staff to ensure that the health care planning team is aware of any special considerations (such as availability of specific equipment or a special vehicle, length of time needed to obtain them, and staff training needs).

Some children with special health care needs may need to bring special equipment to school. Oxygen cylinders, portable ventilators, suction machines, or medication nebulizers must all be stowed safely when transported. Improper securing of equipment could pose a hazard to the child with special health care needs as well as to other children on the vehicle.

Suggested good practices relevant to providing safe transportation for a child with special health care needs are as follows:

- ◆ The vehicle should have standard communication and emergency equipment aboard and have a plan for emergency evacuation.
- ◆ If a child's medication is being transported, a lockable storage receptacle should be provided.
- ◆ The vehicle driver (and substitutes) should have knowledge of:
  - ◇ the location and shortest route to an emergency facility;
  - ◇ how to obtain emergency assistance from the police, fire department, etc.;
  - ◇ proper procedures for vehicle evacuation and appropriate procedures for lifting or carrying the child (if necessary); and
  - ◇ cardiopulmonary resuscitation (CPR).

The vehicle driver should be provided with child specific information (as determined necessary) regarding:

- ◆ the manner in which the child gets on and off the vehicle;

- ◆ the manner in which the child gets from home to the vehicle;
- ◆ the type of emergency which may occur on the vehicle and the emergency plan to follow;
- ◆ the child's method of communication; and
- ◆ the specific behavioral management plan (if any) which has been developed by the parents and school.

When a transportation aide is provided for purposes of assisting a child, the vehicle driver should be informed of the aide's role and responsibilities.

Vehicle drivers should receive training which addresses the following:

- ◆ Confidentiality of information
- ◆ Basic awareness addressing the transportation of children with disabilities
- ◆ Specific training and instructions related to a child's special health care needs, as determined by the child's individualized health care plan.
- ◆ Universal precautions training with annual review.



# ***A Child's Right to Privacy***

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The only times a school district can disclose private information about a child are: (1) when the release of the information has been authorized by the parent; or (2) if the school can demonstrate a "compelling state interest" for release of the information to specific entities or individuals. Such a compelling state interest would be when the individual receiving the personally identifiable information has "a legitimate educational interest" that requires knowledge of the information disclosed.

The federal Family Educational Rights and Privacy Act (FERPA), 34 Code of Federal Regulations (CFR) Part 99, requires that child information which is personally identifiable be handled in a confidential manner. Specifically, 24 CFR 99.30 states:

*An educational agency or institution shall obtain a signed and dated written consent of a parent or an eligible student before it discloses personally identifiable information from the student's education records. Written consent must: 1) specify records that may be disclosed; 2) state the purpose of the disclosure; and 3) identify the party or class of parties to whom the disclosure may be made. Student records may contain health care information as well as academic and disciplinary documentation. Health care information contained in the individual student records may also be protected under state and federal statutes and regulations.*

*Health records related to HIV/AIDS and drug and alcohol assessment and treatment have specific legal protection.*

*Information from an education record may be disclosed in an emergency if knowledge of the information is needed to protect the health and safety of a student or others.*

A district may disclose personally identifiable information without written consent to school officials, including teachers, within the district or cooperative whom the district has determined have a legitimate educational interest requiring knowledge of the information (34 CFR 99.31). The term "disclosure" means to permit access to or the release, transfer, or other communication of education records, or the personally identifiable information contained in those records, to any party, by any means, including oral, written or electronic means.

District and special education cooperative personnel must be trained to limit discussion of personally identifiable information about children

to the times and places when such discussion is required to fulfill a "legitimate educational interest."

The individualized health care plan for the child should be filed with the child's health records. The health care plan should be easily accessible to those personnel who are involved in the provision of the special health care services identified in the plan.

## ***Questions and Interpretations***

**Is it permissible to give the name of the child to the power company, telephone company or emergency services agency when alerting them as to the potential need for emergency services?**

No. The agencies do not need the child's name, only that there is a child in the school who may require emergency medical services, the nature of the health condition, and services which may be required in case of an emergency.

**Do all school personnel who have contact with a child access rights to the child's school health records?**

No. The health care planning team will determine what health information should be shared and with whom.

**Do school personnel have the right to know the diagnosis of a child's health condition?**

No. However, personnel will be informed of functional deficits and safety factors.

Without properly trained staff, it is impossible to ensure a safe environment in the school setting for a child with special health care needs. The nurse responsible for the development and implementation of special health care services must have the following:

- ◆ Specific skills necessary to provide the special health care services needed by the child. This includes knowledge of development of an appropriate individualized health care plan, record keeping, confidentiality requirements, utilization of appropriate equipment, and supplies;
- ◆ Knowledge of medical complications, signs, symptoms, emergency procedures; and
- ◆ A current certificate in CPR

When necessary, the school district should address training for the nurse as part of its staff development plan. Training should be provided to assist the nurse in gaining knowledge to carry out specific procedures required in a child's health care plan. To ensure consistency and continuity in implementing the health care procedure, the same medical personnel who trained the parent and other health care providers in implementation of a special health care procedure should provide the training for the nurse.

In addition to the training of the school nurse, training should also be provided to other school personnel. Examples of training are as follows:

- ◆ General Staff Training. Training addressing universal blood and body fluid precautions, cardiopulmonary resuscitation (CPR), basic first aid, confidentiality and sensitivity training, etc. applicable to all children
- ◆ Child Specific Training. Training for personnel providing direct care to the child

Although the school nurse is generally responsible for arranging the training related to a child's special health care needs, portions of training may be provided by other appropriate personnel (physician, emergency medical technicians, parent, etc.). If sufficient training cannot be accomplished in a timely manner, then the health care planning team should meet again to make alternative plans for the delivery of the child's educational services. If the child receives special education services, an individualized education program (IEP) meeting must be convened and the IEP must be revised and the appropriate services determined.

## ***General Staff Training***

It is recommended that all school personnel have training in basic first aid, universal precautions, and emergency procedures. In addition, when a child has special health care needs which would require staff who come in contact with the child to have more in-depth information, the nurse who participated in the development of the health care plan should provide staff training. Staff training should include a general overview of the child's condition and health care needs. Training should be conducted in conjunction with the family and other appropriate personnel such as the physician. Staff receiving training may include such individuals as the vehicle drivers, paraeducators, teachers, therapists, and others as indicated on the IEP.

Topics that may need to be covered in the general staff training for personnel who come in contact with the child are as follows:

- ◆ An overview of the child's condition and health care needs;
- ◆ Review of the child's individualized health care plan;
- ◆ Roles and responsibilities of personnel in the delivery of the child's health care services;
- ◆ Emergency protocol and plan; and
- ◆ Transportation issues.

If the child's health care needs require the use of specialized equipment, training should include hands-on experience with the equipment and supplies. Whenever possible, the child and parent should be included in the actual training session. Personnel should be encouraged to express their questions and concerns, as well as any fears they may have regarding the child's condition or needs.

Prior to the sharing of child specific information as a part of general staff training, it is important to discuss the information to be shared with the parent, determine what information, specific to the child's health care needs, must be shared, what school personnel have a need to know, and how confidentiality will be maintained.

## ***Child Specific Training***

All school personnel responsible for the direct care of the child during the school day must have training in child specific procedures. Based on the child's special health care needs, personnel may require more formalized training. The level of personnel training should be determined during the development of the child's individualized health care plan. The parents and the child should be integrally included in the training program.

The training of personnel who will be providing direct health care services to the child must be provided by qualified personnel. Qualified personnel is defined as those individuals who are trained in the specific skill to be taught and hold the required credential (certification or license).

The professional responsible for the training of direct care personnel is also responsible for ensuring the competency of the personnel for performing the direct care procedures. The trainer must document the competency level of skills for the direct care provider. It is recommended that the parents also sign the competency documentation to verify their satisfaction with the completion of the training.

Training of direct care personnel must include training in procedures for appropriate documentation of the performance of special health care procedures. Documentation of the procedure is required after the delivery of the procedure. The continuity of the child's health care is dependent on this documentation.

Review of training should be regularly scheduled and occur whenever there has been a change in the child's medical status or if an emergency has occurred. In addition, re-training may be necessary when the individualized health care plan is revised, new direct care personnel are employed, or the child's services are changed.

### ***Peer Group Awareness Training***

Depending on the health care needs of the child, there may need to be provision made for the discussion and sharing of information with the child's peer group. Such training will help children to gain an understanding of the child's condition, foster acceptance in the social environment and reduce fears children may have about socializing with the child with special health care needs.

Prior to the provision of peer group awareness training, the information to be shared and the manner of presentation must be discussed with the parent and with the child. All training with peers must be conducted with full knowledge and written consent of the parent. The parent(s) should be encouraged to take part in the training.

# ***Handling and Administration of Medication***

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Each school district should have policies governing the handling and administration of medications that is in accordance with all other applicable state and federal laws and rules regarding medications. These policies regarding the dispensing of medication should require a signed physician's order and written parental consent.

Physician's orders should include the child's name, date, the medication, dosage and possible side effects. Any order for an "as needed" (PRN) prescription must be accompanied by very specific instructions from the physician.

It is recommended that school district medication policies require:

- ◆ current, signed parent or guardian consent ;
- ◆ current, signed physician's order;
- ◆ properly labeled pharmaceutical container;
- ◆ initial dose to be administered at home, physician's office or hospital;
- ◆ renewal of parent/guardian consent and physician's order at the start of each school year;
- ◆ plan for any required training (including merely informing);
- ◆ clear statement of supply responsibility;
- ◆ strategy for dealing with problems caused by failure to receive; and
- ◆ emergency plan consistent with school's general emergency plan.

Medication should be:

- ◆ Stored under proper temperature; and
- ◆ Maintained in a secure (locked) storage.

# ***Universal Precautions and Infection Control***

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In response to the increase in Hepatitis B and Human Immunodeficiency Virus (HIV) infections, the Centers for Disease Control (CDC) have recommended standard "universal blood and body-fluid precautions." The measures are intended to prevent transmission of infections, as well as to decrease the risk of exposure for care providers and children. As it is currently not possible to identify all infected individuals, precautions must be used with every child, regardless of their medical diagnosis.

Universal precautions pertain to blood and body fluids containing blood, cerebrospinal fluid, synovial fluid, vaginal secretions, semen, and pericardial fluid. These precautions do not apply to other body products such as saliva, sputum, feces, tears, nasal secretions, vomitus and urine, unless blood is visible in the material. However, these other fluids and body wastes can be sources of other infections and should be handled as if they are infectious.

The single most important step in preventing exposure to and transmission of any infection is anticipating potential contact. Personnel should be prepared to use the appropriate precautions and techniques prior to providing care. Diligent and proper hand washing, the use of barriers, appropriate disposal of waste products and needles, and proper decontamination of spills are essential techniques of infection control. Using common sense in the application of these measures will enhance protection of both the care giver and the child.

# ***Special Administrative Considerations***

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## ***Documentation of Special Health Care Procedures***

Precise documentation of the delivery of special health care procedures is an essential part of safe provision of school health services. All special health care services delivered to the child during the school day should be documented in writing on a per-incident basis.

## ***Notification of Emergency Medical Personnel***

Each school district should have a policy governing the appropriate notification of emergency medical personnel. The policy should identify who in the school should be responsible for determining whether a possible medical emergency exists and who is to notify the emergency medical personnel. This policy should be broad enough to consider the needs of all children and allow for the specific needs of individual children to be addressed in special health care plans.

When appropriate, an emergency plan must be included as part of the child's individualized health care plan. Emergency plans should include contingencies of how to handle situations when the individual performing health care procedures is on a break, has to leave school unexpectedly, or is absent.

## ***Management of Do Not Resuscitate (DNR) Orders***

Currently, many districts have been advised by their legal counsel to not follow DNR orders based on the interpretation of the "Rights of the Terminally Ill Act" which was passed in Nebraska in 1991. An individually designed medical resuscitation plan should include the following information.

- ◆ The plan should be designed by a multidisciplinary team of people who know the child, including the parent(s) and the child's health care professionals. The plan may include a representative from Nebraska Advocacy Services (NAS).
- ◆ Decisions regarding the appropriate forms of life-sustaining emergency care for the child are based on expert medical information about the child.
- ◆ Decisions about the plan are recorded and documented.
- ◆ The plan may include a second medical opinion to ensure the appropriateness of the plan's life saving measures.
- ◆ The plan's duration should be limited, and reevaluated periodically to ensure its appropriateness.



Districts should review the Appendix titled "Do Not Resuscitate: School System Policy Development."

Parents should be made aware of the school district's emergency policies and procedures and be advised to discuss the implications of the school's policies with their physician.

***Medical Equipment***

The school should have policies regarding maintenance and storage of medical equipment.

## ***Questions and Interpretations***

**What is the school district's liability if a child dies at school?**

The school has a duty to exercise reasonable care. Negligence is the standard of liability.

**Is a school district responsible for purchasing and supplying medications?**

No. It is the parent's responsibility to purchase and supply the medications to the school.

**Does the school have a responsibility for insuring that a child remembers to take medication at school?**

Yes, the district has an affirmative duty to make reasonable accommodations for a child who must take medications during school or school-sponsored activities. Such medication shall be given in accordance with physician orders.

**Who determines if a child with special health care needs is able to attend school?**

The decision is made by the child's physician.

**Can the school require the parent to come to school to provide for the health care needs of the child?**

No. However, a district may employ the parent as a health care aide.

**Can a school be required to follow a DNR (Do Not Resuscitate) order?**

No. Schools can follow the district's policies for handling medical emergencies.

**How can a district provide for the special health care needs of a child if the district doesn't employ a nurse?**

Districts may contract with individual nurses to provide full or part-time nursing services; or contract with county health departments, nursing homes, or other entities to provide nursing services.

## ***Questions and Interpretations (Con't)***

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**Can a school refuse to enroll a child with special health care needs?**

No. Districts cannot discriminate against a child with special health care needs. Such a child has the right to enroll in school in accordance with state law. A child with special health care needs may be entitled to related services under IDEA or reasonable accommodations under Section 504.

**Can the school require a parent to have a child placed on medication in order to attend school?**

No. Prescription of medication is a medical provider's decision based on medical evaluation of the individual child.

**Is there another way for a child to access education if the child cannot attend school?**

Special education services can be provided in the child's home setting or in a hospital setting.

**Should the dosage of a medication be changed at the request of a parent, even though the physician's order on the medication is different?**

No. If the dosage of medication is to be changed, it must be changed by a physician. The parent or a registered nurse may contact the child's physician to report the behaviors observed in the child which may indicate a need to reevaluate the dosage level or medication prescribed. Before any dosage of medication is changed, it is recommended that the school have a written order signed by a qualified medical provider (physician, physician assistant, or nurse practitioner).

# ***Glossary***

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<b><i>Accountability</i></b>	State of being responsible, answerable, or legally liable for action. Health professionals are accountable for all delegated tasks or functions.
<b><i>Certification</i></b>	The process by which a state or organization authorized by a state government provides a credential to individuals. The process by which a health professional receives recognition from a national certifying body for competence or expertise in a specialty practice area.
<b><i>Chronic Condition</i></b>	A physical, physiologic and/or developmental impairment; any anatomical or physiological impairment that interferes with the individual's ability to function in the environment.
<b><i>Chronic Health Condition</i></b>	One that is long term and is either not curable or has residual features that result in limitations in daily living requiring special assistance or adaptation in function. A condition that interferes with daily functioning for more than 3 months in a year, causes hospitalization of more than 1 month in a year, or (at time of diagnosis) is likely to do either of these.
<b><i>Delegation (Nursing)</i></b>	The process of transferring to another individual the authority, responsibility, and accountability to perform nursing interventions..
<b><i>Delegation (Medical)</i></b>	The process of entrusting the performance of selected medical tasks to competent licensed individuals in selected situations.
<b><i>Developmental Disability</i></b>	Any severe, chronic disability that is attributable to a mental and/or physical impairment, is manifested before age 22 years, is likely to continue indefinitely, results in substantial limitation of function and requires special services.
<b><i>Disability</i></b>	The functional limitations imposed by, and the psychological response resulting from, an impairment.
<b><i>Educational Setting</i></b>	Any setting in which the child receives instruction, whether school building, institution, or home.
<b><i>Free Appropriate Public Education</i></b>	Special education and related services provided at public expense, which meet state education agency standards and are consistent with the child's individualized education program.
<b><i>Health Aide</i></b>	An unlicensed person who is qualified to carry out basic, specialized

health care procedures in the care of children under the supervision of a registered nurse.

<b><i>Health Assessment</i></b>	As used in these guidelines, the collection and analysis of information or data about a child's health condition to determine the child's state of health, patterns of functioning and needs for health services, counseling and education. Health assessment is the licensed function of physicians and nurses.
<b><i>Healthcare Information</i></b>	Physician's reports, information related to diagnosis/treatment prepared by a health care provider. Health screening results may or may not be included in this category as the service is provided as a "screening" and is not diagnostic.
<b><i>Impairment (Health)</i></b>	Any chronic illness, disability, developmental disability or terminal illness, whether physical or mental in nature.
<b><i>Individualized Health Care Plan</i></b>	A plan of action to be developed and used by the registered school nurse and other members of the school team, as appropriate, to meet the child's health needs.
<b><i>Individuals with Disabilities Education Act (IDEA)</i></b>	A federal education act to provide financial aid to states in their efforts to ensure adequate and appropriate services for children with disabilities.
<b><i>Individual Education Program (IEP)</i></b>	A written statement for a child with verified disabilities which specifies the special education and related services necessary to assure that child a free, appropriate public education. The school district is responsible for arranging the team meeting, developing and notifying the IEP team, and the development of the IEP.
<b><i>Individual Family Service Plan (IFSP)</i></b>	A written plan for providing early intervention services to a child with a disability age birth through age two and the child's family. A services coordinator, with the family, is responsible for arranging the team meeting, developing the IFSP team, and facilitating the development of the IFSP.
<b><i>Least Restrictive Environment</i></b>	Each district must ensure that to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled. Special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular

classes with the use of supplementary aids and services cannot be achieved satisfactorily. [34 CFR §300.550(b)(1) and (2)]

***Licensed Health Care Practitioner***

Lawfully authorized person to prescribe medications and treatments.

***Licensed Practical Nurse (LPN)***

An individual who is licensed as a practical nurse by the state of Nebraska, and who functions dependently at the direction of registered nurses or licensed practitioners. [In the school setting, an LPN must be supervised by a registered nurse (RN) or physician.]

***Licensure***

Authority granted by the appropriate governmental agency to an organization or individual to engage in a practice or activity. Authority is granted on the basis of education and examination. Licensure of health professionals in Nebraska is regulated through the Department of Health.

***Medicaid in the Public Schools***

A funding program designed by Nebraska which accesses federal Medicaid funds to pay for physical therapy, occupational therapy, and speech language therapy for Medicaid eligible children which had been previously funded by Nebraska general fund dollars through the special education funding process.

***Medical Services***

Services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services. [34 CFR §300.16(b)(4)]

***Medically Fragile***

Having a life threatening physical condition. For example, children whose chronic health dependence or life threatening condition continually or unpredictably causes incidences which require monitoring and readily available skilled health care providers for the individual's safety and/or survival.

***Multidisciplinary Team***

Individuals representing family, education, health and school administration who have assessed the child and/or will provide direct or indirect services to the child.

***Nurse Practice Act***

A statute enacted by the legislature of any state or by the appropriate officers of the districts or possessions. The act delineates the legal scope of the practice of nursing within the geographical boundaries of its jurisdiction.

***Nursing***

The American Nurses Association (ANA) has defined nursing as 'the diagnosis and treatment of human responses to actual or potential health

problems. Nursing views the patient from an holistic health perspective whereby the individual's mind, body, and spirit are seen as interdependent and functioning as a whole within the environment. Nursing is differentiated from medicine in that the whole person and his/her response to health problems is the focus as opposed to the specific illness itself.

<b><i>Nursing Assignment</i></b>	Appointing or designating another individual the responsibility of nursing interventions.
<b><i>Nursing Delegation</i></b>	Transferring to another individual the authority, responsibility, and accountability to perform nursing interventions..
<b><i>Nursing Diagnosis</i></b>	A statement that describes the human response of an individual or group to actual or potential health problems. Nursing diagnoses are those which the nurse can legally identify and for which the nurse can order definitive interventions to maintain the health state or to reduce, eliminate or prevent alterations.
<b><i>Nursing Direction</i></b>	Managing, guiding, and supervising the nursing interventions performed by another individual.
<b><i>Nursing Supervision</i></b>	Provision of guidance by a registered nurse for the accomplishment of a nursing task or intervention with initial direction of the task or activity and periodic inspection of the actual act of accomplishing the task or intervention. Total nursing care of an individual remains the responsibility and accountability of the nurse.
<b><i>Other Health Impaired</i></b>	A category for special education eligibility which refers to "a child with limited strength, vitality or alertness, due to chronic or acute health problems, which is anticipated to be of more than three weeks' duration" and which adversely impacts educational performance.
<b><i>Registered Nurse (RN)</i></b>	An individual who is licensed in Nebraska by the Nebraska Department of Health to practice nursing. The professional nurse has responsibility for the care of individuals and groups through a colleague relationship with other health care providers, to function in making self-directed judgments, and to act independently in the practice of the profession.
<b><i>Related Service</i></b>	Transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of

disabilities in children, counseling services, including rehabilitation counseling, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training. [34 CFR §300.16(a)]

<b><i>School Health Service</i></b>	Services provided by a qualified school nurse or other qualified person. [34 CFR §300.16(b)(11)]
<b><i>School Nurse</i></b>	A registered nurse or advanced registered nurse practitioner (ARNP) who meets the Nebraska licensing requirements.
<b><i>Special Health Care Needs</i></b>	Health-related services, supports or adaptations required by a child in order to maintain his/her health status including: medical devices, nursing care, psychosocial care, medically necessary services, specific services and equipment to sustain and enrich life and adaptations required to maintain life, provide an environment conducive to growth and development, stimulate learning and maintain him/her in the least restrictive environment.
<b><i>Student or Child</i></b>	Any infant, child or adolescent, birth to age 21, who is planning to enter, or has entered, a school program or other setting where educational services are being provided.
<b><i>Child with Special Health Care Needs</i></b>	One who may require technology, health services and/or some other form of health-related support services or program modifications in order to access an appropriate educational program.
<b><i>Standard of Practice</i></b>	A standard established by custom or authority as a model, criterion, or rule for comparison or measurement.
<b><i>Technology-Dependent Child</i></b>	One who has a long-term chronic disability; requires a medical device to sustain life; requires skilled care or monitoring on a routine daily basis; and is 21 years or younger.
<b><i>Terminal Illness</i></b>	An illness for which there is no further treatment beyond supportive or comfort care and from which death is imminent.
<b><i>Unlicensed Assistive Personnel (UAP)</i></b>	Staff members who are not authorized (by licensure) to provide health care services or perform health care acts or tasks that are regulated by the Nebraska Department of Health. Authorization to provide health related services for students is received from the parent or delegated by the registered nurse.





# Appendices

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# Comparison Of IDEA, Section 504, and the ADA

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	IDEA	Section 504	ADA
<b>Mission:</b>	To provide a free, appropriate, public education (FAPE) in the least restrictive environment.	To provide persons with disabilities, to the greatest extent possible, an opportunity to be fully integrated into mainstream America. Definition as amended: "No otherwise qualified person with a disability in the United States . . . shall, solely on the basis of disability, be denied access to, or benefits of, or be subjected to discrimination under any program or activity provided by any institution receiving federal financial assistance.	Similar to Section 504, but broader in coverage.
<b>Applies:</b>	To all public schools.	To all institutions and programs receiving federal financial assistance. This includes private institutions where children receive federal financial assistance.	To public or private employment, transportation, accommodations, and telecommunications, regardless of whether there is federal funding.
<b>Covers:</b>	Those who have educational disabilities that require special education services, birth to age 21.	All qualified persons with disabilities regardless of whether they received services in elementary or high school. A person is thought to be "otherwise qualified" if the student is able to meet the requisite academic and technical standards, despite their disability.	Similar to Section 504 in that it covers all qualified persons with disabilities and people without disabilities related to and associated with a person with a disability.
<b>Definition of Disability:</b>	Disabilities covered are listed in the act, including specific learning disabilities.	There is not a specific list of disabilities, but a broad inclusionary criteria. The definition of a person with a disability is a person with a physical or mental impairment that substantially limits one or more major life activities. Has a record of the disability, or is regarded as having the disability.	Same criteria as Section 504. HIV status, contagious, and noncontagious diseases recently included.
	IDEA	Section 504	ADA

<b>Identification Process:</b>	Responsibility of school at no expense to the parent or child.	It is the responsibility of the student to self-identify to the institution and provide appropriate documentation of disability. The student with the disability, not the institution is responsible for the cost of all evaluations.	Same as Section 504.
<b>Service Delivery:</b>	Services are determined by a team especially designed for the child and stipulated in the IEP.	Services, academic adjustments, or aids are usually provided in the regular education setting. These services are arranged by a student service coordinator or Section 504 Coordinator.	Similar to Section 504. The student service provider or the ADA coordinator provides services.

# Developing and Maintaining Individualized Health Plans for Children with School Health Service Needs ***A Checklist***

Student's Name: \_\_\_\_\_  
Parent(s) Name: \_\_\_\_\_ Phone: \_\_\_\_\_  
Physician's Name: \_\_\_\_\_ Phone: \_\_\_\_\_

Teacher(s) \_\_\_\_\_

Multidisciplinary Evaluation Team Coordinator: \_\_\_\_\_

IEP Team Coordinator: \_\_\_\_\_

504 Plan Coordinator: \_\_\_\_\_

- \_\_\_\_\_ Request for student health services received from parent or school personnel
- \_\_\_\_\_ Conference with parents and appropriate school personnel to discuss possible need for further evaluation by a registered nurse.
- \_\_\_\_\_ Yes, do evaluation - Registered Nurse does the following:
- \_\_\_\_\_ Secure permission from parent to obtain appropriate medical information
  - \_\_\_\_\_ Secure physician order and any procedural protocols necessary.
  - \_\_\_\_\_ Determine proposed level of nursing care needed
- \_\_\_\_\_ No, an evaluation does not appear to be warranted at this time
- \_\_\_\_\_ Evaluation completed by registered nurse
- \_\_\_\_\_ Information from evaluation shared (if confidentiality regulations permit) with:
- \_\_\_\_\_ Building Administrator
  - \_\_\_\_\_ Parent
  - \_\_\_\_\_ Appropriate Teacher(s)
  - \_\_\_\_\_ MDT (if evaluation is for possible Special Education verification)
  - \_\_\_\_\_ IEP Team (if evaluation is for determining appropriate related special education services)
  - \_\_\_\_\_ Member of IEP team writing current level of performance, goals and objectives
  - \_\_\_\_\_ Need transportation plan?
  - \_\_\_\_\_ 504 Team (if determining a 504 plan)
- \_\_\_\_\_ Written health procedures as necessary are developed with parent and/or physician input
- \_\_\_\_\_ Parent permission given for ongoing communication between registered nurse and the student's physician(s).
  - \_\_\_\_\_ Delegation decisions made and communicated with appropriate administrative and other personnel and parents
  - \_\_\_\_\_ Training developed and provided for appropriate personnel
  - \_\_\_\_\_ Distribute plan to care givers
  - \_\_\_\_\_ Written emergency plans are posted in clear view in classroom, readily available.
    - \_\_\_\_\_ plan for alerting emergency personnel
    - \_\_\_\_\_ emergency system for student being transported

## **PLANNING CHECKLIST FOR IHCP AND IEP DEVELOPMENT**

### **For Students with School Health Care Needs**

#### **FAMILY**

- ☐ Goals/priorities
- ☐ Liaison
- ☐ Collaboration
- ☐ Communications
- ☐ Other

#### **HEALTH SERVICES**

- ☐ Parent authorization(s)
- ☐ Nursing assessment, including student strengths
- ☐ Release of information to/from health care provider
- ☐ Physician consultation/orders
- ☐ Individualized health care plan
- ☐ Emergency plans
- ☐ Health status monitoring, documentation
- ☐ Specialized health care procedure
- ☐ Medication/ documentation, monitoring, report to provider
- ☐ Personnel training
- ☐ Personnel supervision
- ☐ Staff consultation
- ☐ Family support/liaison
- ☐ Health teaching/ counseling
- ☐ Privacy
- ☐ Other

#### **ACCESS**

- ☐ School entrance
- ☐ Hallways
- ☐ Stairs/elevator
- ☐ Classroom/specials
- ☐ Bathroom
- ☐ Health room
- ☐ Cafeteria
- ☐ Library
- ☐ Locker
- ☐ Gym
- ☐ Playground
- ☐ Other

#### **FIRE SAFETY**

- ☐ Evacuation plan
- ☐ Evacuation practice
- ☐ Back-up plan
- ☐ Other

#### **SCHEDULING**

- ☐ Length of day
- ☐ Number of days
- ☐ Rest periods
- ☐ Flexible schedule
- ☐ Testing schedule
- ☐ Other

#### **THERAPIES**

##### **(Assessment/Service)**

- ☐ Nursing (IHCP)
- ☐ Occupational therapy
- ☐ Physical therapy
- ☐ Speech language pathology
- ☐ Other

#### **TRANSPORTATION**

- ☐ Vehicle
- ☐ Access
- ☐ Safety
- ☐ Equipment
- ☐ Positioning
- ☐ Emergency plan
- ☐ Communications
- ☐ Special assistance
- ☐ Evacuation
- ☐ Aide
- ☐ Other

#### **FIELD TRIPS**

- ☐ Medication plan
- ☐ Emergency plan
- ☐ Personnel
- ☐ Transportation
- ☐ Personal hygiene
- ☐ Cellular phone
- ☐ Other

#### **EXTRACURRICULAR ACTIVITIES**

- ☐ Special learning opportunities (eg., work experience)
- ☐ Extended day program
- ☐ Clubs
- ☐ Sports, recreation
- ☐ Social events
- ☐ Transportation
- ☐ Access
- ☐ Other

#### **OTHER RELATED SERVICES**

- ☐ Counseling

#### **TUTORING/ HOME/ HOSPITAL**

- ☐ Nursing
- ☐ Psychology
- ☐ Social work
- ☐ Recreational
- ☐ Other

- ☐ Supplemental in school  
tutor -regular,  
intermittent
- ☐ Plan for continuous  
programming  
school/home/hospital
- ☐ Extra set of books at home
- ☐ Regular home/hospital  
program
- ☐ Other

#### **OTHER PROGRAM ADAPTATIONS**

- ☐ Curriculum/instruction
- ☐ Special equipment
- ☐ Activities of daily living
- ☐ Scheduling of health  
interventions
- ☐ Positioning
- ☐ Mobility
- ☐ Special diet
- ☐ Other

**OTHER:**

**COMMENTS:**

# ***Delegation of School Health Services to Unlicensed Assistive Personnel***

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*The National Association of State School Nurse Consultants, the cadre of nurse consultants responsible for school nursing services within each state, worked with a national facilitator to achieve consensus on the issue of delegation of school health services to unlicensed assistive personnel. They issued the following position paper (Revised July, 1995) to guide school personnel in the provision of safe health care services to students.*

## ***Belief Statements***

The National Association of State School Nurse Consultants' position of delegation of health services in schools includes the following beliefs:

- ◆ In order to benefit from educational programs and to maximize energy for learning, students with chronic health conditions must maintain their health at an optimal level in school. This requires access to safe environments and to health care services provided by professional registered nurses (RNs) and, when appropriate, by qualified unlicensed assistive personnel (UAPs) to whom RNs safely delegate aspects of student care.
- ◆ Safe delegation of nursing activities in schools requires that:
  - ◇ the primary goal is to maximize the independence, learning, and health of students;
  - ◇ individualized student health care plans are developed by the RN in collaboration with the student, family, health care providers, and school team;
  - ◇ school nurses receive standardized education related to delegation to and supervision of unlicensed assistive personnel (UAPs);
  - ◇ unlicensed assistive personnel (UAPs) successfully complete standardized training and child-specific training prior to participating in delegated care; and
  - ◇ the RN uses professional judgment to decide which [student] care activities may be delegated, to whom, and under what circumstances. "This professional judgment is formed by the state nursing practice act and national standards of nursing. Institutional policies cannot contradict state law" (*Am. Nurses' Assoc., 1994, p.11*).

## ***Definitions***

*Delegation* is "the transfer of responsibility for the performance of an activity from one individual to another, with the former retaining accountability for the outcome" (American Nurses' Association (ANA), 1994, p.11).

While some state rules, regulations or guidelines may use different terms for delegation of nursing care activities, the critical concept is that when the RN determines that someone who is not licensed to practice nursing can safely provide a selected nursing activity or task for an individual student and delegates that activity to the individual, the RN remains responsible and accountable for the care provided.

*Unlicensed assistive personnel (UAP)* "are individuals who are trained to function in an assistive role to the registered professional nurse in the provision of [student] care activities as delegated by and under the supervision of the registered professional nurse" (ANA, 1994, p.2).

*Supervision* "is the active process of directing, guiding, and influencing the outcome of an individual's performance of an activity" (ANA, 1994, p.10).

### ***Rationale***

Across the nation today, students with special health care needs are attending school and placing new demands on school districts. Local school boards must provide sufficient staff and resources to ensure a level of school health services previously not required. The reasons include:

- ◆ Changes in the health care system resulting in the medical treatment of children, even those with complex medical problems, in out-patient community settings rather than in-patient, acute care settings;
- ◆ Advances in medical technology resulting in far greater mobility of those who are technology dependent, allowing them to live at home and attend school;
- ◆ Federal mandates ensuring students with health-related disabilities access to appropriate educational programs and related services in the least restrictive environment; and
- ◆ Parents' expectations regarding their children's rights to care in school.

These trends raise issues regarding educational placement and maintenance of student health and student safety, as well as school and professional accountability. In making decisions about the educational placement of students with health care needs and the provision of nursing services, the primary concern must be the health and safety of the students. A secondary concern is the liability of all involved parties (e.g., the school board, school administrators, school staff and the school RN). School administrators are legally responsible for the safety of all students, including the provision of required health services by qualified staff. Using unqualified staff risks harm to students. In addition, unlicensed school staff are liable for their actions if they practice nursing or medicine without a license.

### ***Nurses' Responsibility for Quality Care***

By professional and legal mandate, school RNs are ultimately responsible to the student for the quality of nursing care rendered. If a nurse errs in making decisions regarding care or who can safely perform it, the student suffers. In addition, the RN can be personally and professionally liable for errors in nursing judgment. If the RN's actions violate the requirements of the nursing practice act, the state board of nursing can take disciplinary action against the RN, including revocation of his/her license to practice nursing.

While school district administrators have certain responsibilities regarding the student's educational placement, they cannot legally be responsible for deciding the level of care required by an individual student with special health care needs. The RN, based on the state's nurse practice act and related state rules and regulations, determines whether care should be provided by a licensed nurse or delegated to trained and supervised unlicensed assistive personnel.

The registered professional school nurse is responsible to determine whether delegation of nursing care is appropriate in each individual situation even if a



physician or other health professional states or "orders" that such care should be provided by a unlicensed assistive personnel (unless that physician or other professional takes full responsibility for the training and supervision of the unlicensed assistive personnel). Furthermore, it must be both legally and professionally appropriate for that professional to engage in delegating the specific health care activity to unlicensed individuals.

While parents sometimes believe that they should determine the level of care required for their child, it is critical for parents to distinguish between themselves as care takers at home and employed school personnel as care providers at school. Among other variables, the school setting is an environment entirely different from the home: school personnel have different responsibilities in their positions and different obligations under the law, school personnel change, and the parent does not have the authority in the school to make administrative decisions or to supervise school staff. In addition, while nursing practice acts make exceptions for parents or family members who provide nursing care to a family member in their homes, this exception to the licensure provisions does not empower families to extend that right to other individuals in other settings. It is essential that the family, school RN, school team and health care providers work in collaboration to plan and provide the student with high-quality care in an environment that is not only least restrictive, but also safe for all students and staff.

### ***Questions About Delegating Care***

There are two critical questions involved in delegating and supervising a nursing care activity:

1. *Is the activity a nursing task under the state's definition of nursing?*

Nursing activities are defined by state statute and interpreted by the state board of nursing. A state's attorney general's opinion, court decision, or other mandate may modify the state's definition of nursing or interpretation of its scope of practice. Based on these definitions and interpretations, the nurse decides whether or not the activity procedure is one that can only be performed by a registered nurse.

2. *Can the activity be performed by unlicensed assistive personnel under the supervision of a registered nurse?*

The delegation of nursing activities to unlicensed assistive personnel may be appropriate if:

- ◆ it is not otherwise prohibited by state statute or regulations, legal interpretations, or agency policies;
- ◆ the activity does not require the exercising of nursing judgment; and
- ◆ it is delegated and supervised by a registered nurse.

### ***Determinations Required in Each Case***

The delegating and supervising registered nurse makes the following determinations, on a case-by-case basis, for each student with health care needs and each required nursing care activity:

- ◆ The RN validates the necessary physician orders (including emergency orders), parent/guardian authorization, and any other legal documentation necessary for implementing the nursing care.

- ◆ The RN conducts an initial nursing assessment.
- ◆ Consistent with the state's nursing practice act and the RN's assessment of the student, the RN determines what level of care is required: registered professional nursing, licensed practical or vocational nursing, other professional services, or care by unlicensed assistive personnel (UAP).
- ◆ Consistent with the state board of nursing regulations, the RN determines the amount of training required for the unlicensed assistive personnel. If the individual to whom the nurse will delegate care has not completed standardized training, the RN must ensure that the unlicensed assistive personnel obtains such training in addition to receiving child-specific training.
- ◆ Prior to delegation, the nurse evaluates the competence of the individual to safely perform the task.
- ◆ The RN provides a written care plan to be followed by the unlicensed staff member.
- ◆ The RN indicates, within the written care plan, when RN notification, reassessment, and intervention are warranted due to a change in the student's condition, the performance of the procedure, or other circumstance.
- ◆ The RN determines the amount and type of RN supervision necessary.
- ◆ The RN determines the frequency and type of student health reassessment necessary for on-going safety and efficacy.
- ◆ The RN trains the unlicensed assistive personnel to document the delegated care according to the standards and requirements of the Board of Nursing and agency procedures.
- ◆ The RN documents activities appropriate to each of the nursing actions listed above.

***If Care Cannot Be Safely  
Provided in School***

After consultation with the family, student's physicians, other health care providers, other members of the school team, and appropriate consultants, the RN may determine that the level of care required by the student cannot be safely provided under current circumstances in the school. In that event, the school nurse should refer the student back to the initial assessment team and assist the team to reassess the student's total needs and explore alternative options for a safe and appropriate program. If such a program is not designed and the student continues in an unsafe situation, the RN should:

- ◆ Write a memorandum to his/her immediate supervisor explaining the situation in specific detail, including:
  - ◇ Recommendations for safe provisions of care in the school; or
  - ◇ The reason the care or procedure should not be performed in school and a rationale to support this.
- ◆ Maintain a copy of the memo for the RN's personal file.
- ◆ Allow the supervisor a reasonable period of time to initiate action to safeguard the student.
- ◆ If such action does not occur, forward a copy of the memo to the following, as indicated: the State Board of Nursing, the district superintendent, the State School Nurse Consultant, and the division of special education, Department of Education.

- ◆ Regularly notify his/her supervisor and others, as appropriate, that the unsafe situation continues to exist until such time as the issue is resolved.

**Reference**

American Nurses' Association. (1994). *Registered professional nurses & unlicensed assistive personnel*. Washington, D.C.: American Nurses Publishing.

# ***The Nursing Professional's Role Related To Unlicensed Assistive Personnel (UAP)***

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Adapted from **Registered Professional Nurses & Unlicensed Assistive Personnel.** (1994). American Nurses Association (ANA)

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*"All decisions related to delegation of nursing interventions must be based on the fundamental principle of protection of the safety and welfare of the public. Boards of Nursing are responsible for the regulation of nursing. Provision of any care which constitutes nursing or any activity represented as nursing is a regulatory responsibility of the Board of Nursing. Nursing is a process discipline and cannot be reduced solely to a list of tasks. The licensed nurse's specialized education, professional judgment and discretion are essential for quality of nursing care."*

-The National Council of State Boards of Nursing (1995)

The nursing profession is directly accountable to the public for its practice, and must, therefore, monitor the regulation, education, and utilization of UAPs.

*"Unlicensed assistive personnel (UAPs) are individuals who are trained to function in an assistive role to the registered professional nurse in the provision of student care activities as delegated by and under the supervision of the registered nurse (RN)"*

## **Nursing's Professional Accountability**

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### **It is the Nursing Profession**

that determines the scope of nursing practice.

### **It is the Nursing Profession**

that defines and supervises the education, training, and utilization of any unlicensed assistant roles involved in providing client care.

### **It is the Registered Nurse**

who is responsible and accountable for nursing practice.

### **It is the Registered Nurse**

who supervises and determines the appropriate utilization of any unlicensed assistant involved in direct client care.

### **It is the Purpose**

of unlicensed assistive personnel to assist the RN in providing

It is the responsibility of the individual RN and the nursing profession to control the training, practice, and utilization of UAPs involved in the provision of direct care to students in school settings. School district policy about the utilization of UAPs must be based on assuring quality care outcomes and student/family satisfaction. This is accomplished by utilizing national standards of nursing practice, definitions of nursing, the Nebraska Nurse Practice Act, nursing models for care, and knowledgeable RNs with a clear understanding of the professional scope of nursing practice, its application to the school setting and staff compositions.

### ***Regulation of Unlicensed Assistive Personnel (UAP)***

Registered nurse supervision of the activities of the UAP is integral and necessary to the implementation of unlicensed assistive personnel. UAPs can be trained to perform some interventions associated with the delivery of direct care to students, even though these interventions — those that can be safely and legally assigned to an assistant — are traditionally considered nursing practice. These functions cannot be performed in isolation from the nursing process if the activities are nursing interventions. Certain functions are solely within the scope of nursing and as such are central to its practice, and can *never be delegated*.

A primary issue raised by the use of UAP's is the potential liability of the RN who delegates to them. The determination of liability is done at the state level and is based upon each state's interpretation of the legal and professional definition of the practice of nursing. The delegation and supervision of nursing interventions carries accountability for the RN who remains legally responsible.

The RN and the UAP share responsibility for performing the nursing interventions correctly, but it is the RN who is responsible for the completion of the intervention and accountable for the performance of the assistant. If an assistant has the appropriate training, orientation, and documented competencies, the RN can be reasonably sure that the UAP should function in a safe and effective manner. It may then be appropriate to delegate a specific intervention to the UAP in a student-specific care situation.

#### **When is an RN at risk when delegating tasks to UAPs?**

- ◆ When the RN knowingly delegates a nursing care intervention to an UAP that only a licensed nurse can perform, or when the delegation is contrary to law or involves a substantial risk of harm to a student.
- ◆ When the RN fails to exercise adequate supervision of the UAP to whom direct care interventions have been delegated.
- ◆ When the RN knowingly delegates direct care interventions to an UAP who has not had the appropriate training or orientation.

A review of the legal aspects of nursing practice can help the RN avoid these situations.

#### **Where will a RN find information on accountability for nursing practice?**

- ◆ Review the Nebraska Nurse Practice Act. The law as written in this Act is the first definition to seek when determining the meaning and intent of nursing practice. Knowledge of this Act and applicable regulations is a professional responsibility. State laws and regulations supersede any publications or opinions promulgated by the profession.
- ◆ The next step is to thoroughly review the regulations issued by the Nebraska Board of Nursing (Chapter 99, Regulations Governing the Provision of Client Care, 1996). The Board of Nursing (licensing authority) develops definitions and regulations that provide guidance and interpretation of the law (Nurse Practice Act). Regulations delineate the relationship and

responsibilities of the RN to Licensed Practical Nurses (LPNs) and UAPs, and also define **delegation, assignment, and supervision**.

- ◆ If no statutory or regulatory definitions or guidelines exist to address a specific concern, a review of any state litigation, attorney general opinions, or administrative actions may be an option. If not, then the common law (customary legal interpretation), based on case law definition, takes precedence. An attorney familiar with *health law* would be a resource for these determinations.

NOTE: The RN is accountable for determining when delegation is appropriate, whether the UAP is appropriately trained and competent, and for providing ongoing supervision and evaluation of outcomes of student care. The RN is liable for NOT carrying out these responsibilities according to reasonable standards of practice, but is not responsible for an error made by the UAP if the RN's responsibilities were carried out with good judgment and actions that meet the standard of nursing care (that which another reasonable school nurse in the same circumstances would meet).

### **The Five Rights of Delegation**

*Adapted from the National Council of State Boards of Nursing, Inc., 1995.*

**Right Task** — One delegated for a specific client

**Right Person** — Right person is delegating or assigning the right task to the right person to be performed for the right client.

**Right Direction/Communication** — Clear, concise description of the intervention, including its objective, limits and expectations.

**Right Supervision** — Appropriate monitoring, evaluation, intervention needed, and feedback.

**Right Circumstances** — Appropriate client setting, available resources.

In delegating, the RN uses professional judgment to decide which direct care activities may be delegated, to whom, and under what circumstances. This professional judgment is framed by the Nurse Practice Act and national standards of nursing. The RN must evaluate each student care situation individually to determine if delegation is appropriate. *District policy may limit the amount of delegation permitted, but cannot require the RN to delegate when the nurse judges that it would constitute unsafe care for the student.* Institutional policies cannot contradict state law.

A Decision Grid is presented at the end of this section to assist RNs in determining the appropriateness of delegating a specific activity to an UAP. This decision making process provides guidance for the RN delegating to UAPs. It is important to note that the assignment of scores in this tool is based on subjective analysis and, because of this, the reliability of the tool has not been established.



***When using the decision grid, it remains imperative that school districts and nurses follow Nebraska Chapter 99 - Regulations Governing the Provision of Nursing Care.***

School nurses may find the following decision grid helpful in making decisions about delegating nursing care activities to unlicensed assistive personnel. The lower the score, the more likely one may consider delegation. The higher the score, the less likely one would be able to delegate the nursing care intervention.

**\*DECISION GRID FOR REGISTERED PROFESSIONAL  
SCHOOL NURSES TO DELEGATE**

FIVE FACTORS AFFECTING DECISION TO DELEGATE

Task and Specific Patient Combination	Potential For Harm	Complex Nature of Task	Problem Solving and Innovation Necessary	Unpredictability of Outcome	Level of Interaction Required with Patient	Total
Suctioning (oral): with catheter or bulb syringe.  Student has cerebral palsy with significant oral secretions and drooling	1	1	1	1	2	6
Suctioning (tracheal): with catheter.  Student is a drowning survivor with swallowing deficit and decreased cough reflex.	3	3	3	2	2	13
Tube Feeding - new N/G tube.  Student has long history of gastric reflux, aspiration pneumonia and failure to thrive.	2	2	3	3	3	13
Tube Feeding - long term G-button.  Student is survivor of severe traumatic brain injury in stabilized condition for three years.	1	2	1	1	1	6

\* ***Adapted from Delegation of Nursing and Non-Nursing Activities in Critical Care: A Framework for Decision Making (1990) American Association of Critical Care Nurses.***



# ***"Do Not Resuscitate" School System Policy Development***

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The following outline was authored by Carol Costante, R.N., C.S.N., M.A., Supervisor of School Health Services in the Baltimore County Public Schools. The outline was presented on June 25, 1993 during the N.A.S.N. Conference held in Minneapolis, Minnesota.

## **Committee to Develop Position:**

- ◆ Potential Committee Members
  - ◇ Physician/school health medical officer
  - ◇ School health services supervisor
  - ◇ School health nurse
  - ◇ Special education administrator
  - ◇ Principals (Elementary, Middle, and Secondary)
  - ◇ Teachers
  - ◇ Parents
- ◆ Possible Consultants to the Committee
  - ◇ Emergency medical services representative
  - ◇ School board attorney
  - ◇ Local hospital emergency physician
  - ◇ State Department Representatives

## **Issues to Determine:**

- ◆ Legal Basis
  - ◇ Existence of state level policy/legislation
  - ◇ State and local law concerning the right to limit life sustaining procedures for terminally ill minor children
  - ◇ Regulations governing local emergency medical services re: DNR orders
  - ◇ The school system's obligation "in loco parentis"
  - ◇ The school system's legal authority to honor DNR orders
  - ◇ Whether life saving termination decisions should remain solely within the domain of medical professionals
- ◆ Health Care System Considerations
  - ◇ Whether DNR decisions should only be made in the context of an emergency medical facility or hospital
  - ◇ The size of the school system and numbers of community physicians, hospitals, and emergency service personnel
  - ◇ Relationship between the medical community and emergency medical services
  - ◇ Logistical operations of the emergency medical services system
- ◆ School Level Considerations
  - ◇ The primary mission of local schools
  - ◇ General policies and procedures involving emergency first aid and resuscitation
  - ◇ The impact of honoring DNR orders on the entire school community
  - ◇ Professional school nurse ratio and role
  - ◇ Personnel to be responsible for the decision of initiating DNR protocol
  - ◇ Mechanism for maintaining and activating DNR orders
- ◆ Parent and Child Concerns
  - ◇ Parental preference and motives
  - ◇ Alternatives to a DNR option
    - Home/hospital teaching
    - Respite care
    - Hospice program

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**SAMANTHA NEELY, GEORGE  
NEELY, CAROL NEELY,**  
*Plaintiffs-Appellees,*

v.

**RUTHERFORD COUNTY SCHOOL,**  
*Defendant-Appellant.*

United States Court of Appeals  
For the Sixth Circuit

ON APPEAL from the United States District Court for the Middle District of Tennessee

No. 94-5755

Decided and Filed November 2, 1995

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Before: WELLFORD, MILBURN, and SUHRHEINRICH, Circuit Judges

HARRY W. WELLFORD, Circuit Judge. We are called upon here to interpret the scope of the "medical services" exclusion to the Individuals with Disabilities Education Act.

("IDEA"), 20 U.S.C. § 1401(17).[1] Plaintiff Samantha Neely is a seven year old child who attends school in Rutherford County. Samantha suffers from a medical condition which required that she receive a tracheostomy. As a result of her condition, Samantha must undergo regular suction of throat, nose, and mouth areas in order to avoid serious and, even life threatening, health consequences. George and Carol Neely, Samantha's parents, believe that the IDEA obligates Rutherford County to provide Samantha with suctioning services while she is in school and that Tennessee law requires that those services be provided by a licensed medical professional. The district court agreed with plaintiffs and rejected Rutherford County's contention that such services were "medical services" that Congress specifically excluded under the IDEA. For the reasons stated below, we **REVERSE** the decision of the district court.

## **I. STATEMENT OF FACTS**

There is little dispute concerning many of the facts of this controversy. Samantha Neely suffers from Congenital Central Hypoventilation Syndrome, an extremely rare condition that causes breathing difficulties. Samantha's tracheostomy procedure was necessary to assist her breathing. The procedure creates an opening in the throat, known as a stoma, through which a breathing tube is inserted. This tube must remain in place at all times, but the tube can be dislodged relatively easily if Samantha coughs or even adjusts her clothing. Should the tube become dislodged, Samantha's respiratory functions will cease or become shallow, she will lose consciousness, and she will die if full breathing is not quickly restored. [2]

As a result of the tracheostomy, Samantha is unable to expel throat, mouth, and nose secretions. Consequently, she must regularly suction her breathing passage by mechanical device to ensure that the secretions do not create a blockage; such a blockage would lead to death if not quickly cleared. The number of times Samantha has a cold, she must be suctioned approximately every twenty minutes; when Samantha is in good health, she may need to be suctioned only after meals.

If Samantha's breathing stops, she may require ventilation with an AMBU bag, which is a device that artificially pumps air into the lungs. If care is not administered within a very few minutes, serious brain damage or death will occur. Samantha is unable to provide her own tracheostomy care. A well-trained individual is required because insertion of the breathing tube can be difficult. The suctioning process must be carefully performed to avoid injury to Samantha and there is little margin for error when resuscitation methods are required. Given the short response time available in emergency situations, the care giver must have sufficient training to avoid panic. Samantha's attendant must devote considerable amounts of his or her attention to Samantha and must be readily accessible to her.

During her first year of school, Samantha's parents alternately attended school with Samantha to provide the care she needs. Due to illness of another child, however, the Neelys petitioned the school district to hire a full-time nurse or respiratory care professional to attend to Samantha during the coming school year. Rutherford County initially agreed to employ an attendant with the requisite training and revised Samantha's individualized educational plan ("IEP") [3] accordingly. The school district, however, subsequently hired an individual with only a nursing assistant's certification. The Neelys objected and removed Samantha from school when the care requested was not promptly provided. After a meeting with school officials to determine why it had not hired a respiratory care professional, the parties agreed that Samantha would receive home instruction until the Education Department could determine whether Rutherford County had to hire a nurse to provide in-school, full-time care for Samantha .

Samantha's parents requested a due process hearing before the Tennessee Department of Education. On October 28, 1993, an administrative law judge (ALJ) held a hearing at which the parties submitted testimonial and documentary evidence. The ALJ concluded that the care requested by Samantha was a "medical service" which Rutherford County was not obligated to provide under the IDEA. After the Education Department entered its final order, Samantha and her parents filed suit in federal district court seeking judicial review. The district court held a hearing and provided both parties the opportunity to offer evidence. Neither party submitted any evidence at the hearing, but the Neelys submitted the full administrative record to the district court and supplemented the record with the affidavit of George Neely, Samantha's father. After a review of the evidence, the district court found that the services requested by Samantha were supportive services that the IDEA required Rutherford County to provide. In addition, the district court found that these services were not medical services excluded under the Act.

The district court therefore reversed the ALJ's decision and ordered the school district to provide the requested care. Rutherford County filed this timely appeal.

## **II. STANDARD OF REVIEW**

Section 1415(e)(2) of the IDEA provides that "[i]n any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines appropriate." 20 U.S.C. § 1415 (e)(2). A preponderance finding is indicated in an IDEA action, *Doe ex rel. Doe v. Defendant 1*, 898 F.2d 1186, 1190 (6th Cir. 1990), and the Supreme Court has rejected unrestricted *de novo* review. In *Board of Education of the Henrick Hudson Central School District v. Rowley ex rel. Rowley*, 458 U.S. 176, 206 (1982), the Court stated that the provision that a reviewing court base its decision on the "preponderance of the evidence" is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review. The very importance which Congress has attached to compliance with certain procedures in the preparation of an IEP would be frustrated if a court were permitted simply to set state decisions at naught. *The fact that § 1415 (e) requires that the reviewing court "receive the records of the [state] administrative proceedings" carries with it the implied requirement that due weight shall be given to these proceedings.* And we find nothing in the Act to suggest that merely because Congress was sketchy in establishing substantive requirements, as opposed to procedural requirements for the preparation of an IEP, it intended that the reviewing courts should have a free hand to impose substantive standards of review which cannot be derived from the Act itself. *Id.* (emphasis added).

In light of *Rowley*, we have interpreted § 1415 (e)(2) as calling for "a modified *de novo* review." *E.g., Doe ex rel. Doe v. Board of Educ. of Tullahoma City Schs.*, 9 F.3d 455,458 (6th Cir. 1993); *Thomas ex rel. Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618,624 (6th Cir. 1990). This modified standard "requires a *de novo* review but the district court should give due weight to the state administrative proceedings in reaching its decision." *Roncker ex rel. Roncker v. Walter*, 700 F.2d 1058, 1062 (6th Cir.), *cert. denied*, 464 U.S. 864 (1983). We, therefore, give the ALJ's decision appropriate consideration.

## **III. THE REQUIREMENTS OF THE IDEA**

Congress enacted the IDEA as remedial legislation in order to enhance the educational opportunities of handicapped children. *Thomas ex rel. Thomas*, 918 F.2d at 619. The Act's overall objective is to guarantee handicapped children a substantive right to a "free appropriate public education." 20 U.S.C. §1412(1). The IDEA defines the phrase, free appropriate public education (FAPE), as "special education and related services" that are provided at public expense and supervision, that meet state educational standards, and that conform with the IEP developed for each child. *ID.* § 1401(18). Section 1401(16) defines "special education" as "specially designed instruction, at no cost to parents or guardians,

to meet the unique needs of a child with a disability -- including (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (B) instruction in physical education."

*Id.* § 1401(16)(A),(B). Section 1401(17) states that "related services" include transportation, and such developmental, corrective, and *other supportive services* (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, and *medical services, except that such medical services shall be for diagnostic and evaluation purposes only*) as may be required to assist a child with a disability to benefit from special education.

*Id.* § 1401(17) (emphasis added).

The issue in the case at bar is whether the care requested by Samantha is a "related service" under the IDEA. If the requested care is a related service, the IDEA obligates Rutherford County to provide the service free of charge.

In deciding whether a service is a "related service" under § 1401(17), we must first answer two subsidiary questions. *See Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 890 (1984). We must initially determine whether the requested service is a "supportive service[]" . . . required to assist a child with a disability to benefit from special education." *Id.* (quoting 20 U.S.C. § 1401(17)). If not, then the IDEA imposes no obligation on the school system to provide the service. *Id.* at 894 (explaining that if requested service can be performed at some time other than during the school day than it is not a service "necessary to aid a handicapped child to benefit from special education"). If the requested service is a supportive service, then we must also decide whether the service is a "medical service" which is excluded from the requirements of §1401(17). *Id.* at 890.

Rutherford County concedes that the cleaning of Samantha's tracheostomy is a supportive service that is necessary to enable the child to enjoy the benefit of special education. It argues, however, that the requested care is a medical service performed for other than diagnostic and evaluative purposes. The district court acknowledged that "the care requested is clearly medical in nature," but it held that, "[a]bsent evidence that the care requested would be unduly burdensome to the school district, the nursing care *will be deemed* a related, supportive service that falls outside the medical services exclusion."

By its own terms, § 1401(17) would seem to indicate that a school district pay for only those medical services which are performed for diagnostic and evaluation purposes. Thus, one might assume that a school district is not required under the Act to provide a medical service that is performed for any other purpose. [4] In *Tatro*, however, the Supreme Court did not focus on the purpose for which the service is performed but determined that the application of the

medical services exclusion depends on who provides the service and the burdens associated therewith. *Tatro*, 468 U.S. at 892-94.

*Tatro* involved an eight year old girl who was born with spina bifida, a congenital birth defect. *Id.* at 885. The birth defect caused a neurogenic bladder which prevented her from urinating voluntarily. *Id.* As a result, the child had to undergo intermittent catheterization every three or four hours. [5] *Id.* When the child's school district refused to hire personnel to perform the catheterization, her parents filed suit, alleging that the requested service was a related service which the school district was obligated to provide. *Id.* at 886. The Supreme Court found that the catheterization service was a support service which enabled the child to enjoy the benefits of special education. *Id.* at 891. The Court then turned its attention to whether the requested service was a medical service excluded under the Act. *Id.* In finding that the catheterization was *not* a medical service, the Court relied heavily on regulations issued by the Department of Education which included "school health services" within the definition of related services. *Id.* at 892 (quoting 34 C.F.R. § 300.13(a)). "School health services" were defined, in turn, as "services provided by a qualified school nurse or other qualified person". *Id.* (quoting 34 C.F.R. §300.13(b)(10)). The Court also noted that the Secretary of Education defined the term "medical services" as those "services provided by a licensed physician" *Id.* (quoting 34 C.F.R. § 300.13(b)(4)).

The Court concluded that, when read together, these regulations required the school to provide services which could readily be performed by a school nurse while services performed by a physician were excluded. *Id.* The Court found that the Secretary's interpretation of the statutory language warranted deference, because it was reasonable to believe that Congress included the medical services exception in order to "spare schools from an obligation to provide a service that might well prove unduly expensive and beyond the range of their competence." *Id.* In such a case, *Tatro* pointed out, "[c]hildren with serious medical needs are still entitled to an education. . . [since] the Act specifically includes instruction in hospitals and at home within the definition of 'special education'". *Id.* at 892 n. 11 (citing U.S.C. § 1401(16)). Because the catheterization could be provided by a school nurse or trained layman, however, the Court held that it was reasonable for the Secretary to conclude "that school nursing services are not the sort of burden that Congress intended to exclude as a 'medical service'" *Id.* at 893.

*Tatro* is subject to several interpretations. It may be read as adopting a bright line rule that any medical service that can be performed by someone other than a licensed physician falls outside the scope of the exception and must be provided by the school. *Macomb County Intermediate Sch. Dist. v. Joshua S.*, 715 F. Supp. 284, 828 (E.D. Mich. 1989). The majority of courts, however, have rejected such a *per se* rule. See, e.g., *Granite Sch. Dist. v. Shannon*, 787 F. Supp. 1020, 1027 (D. Utah 1992); *Bevin H. ex rel. Michael H. Wright*, 666 F. Supp. 71, 75 (W.D. Pa. 1987); *Detsel ex rel. Detsel v. Board of Educ. of Auburn Enlarged City Sch. Dist.*, 637 F. Supp. 1022, 1026-27 (N.D.N.Y. 1986). In *Shannon*, the United States District Court for

the District of Utah stated that it did not read *Tatro* to stand for the proposition that *all* health services performed by someone other than a licensed physician are related services under the Act regardless of the amount of care, expense, or burden on the school system, and, ultimately, on other school children. Rather, the Court held only that services which *must* be provided by a licensed physician, other than those which are diagnostic or evaluative, *are* excluded and that school nursing services of a simple nature are not excluded.

*Shannon*, 787 F. Supp. at 1027 (emphasis added).

In the instant case, the district court found this rationale persuasive and refused to allow a *per se* rule. Instead, the court concluded that *Tatro* required it to measure the burden on the school district to provide the requested care and to require the school to provide the service if the burden was not excessive.

Rutherford County argues that the district court misapplied the *Tatro* rationale by engaging in a balancing of interests analysis *after* it had already determined that the requested care was a medical service. Defendant maintains that the only relevant inquiry is whether the service is medical in nature and, if that question is answered in the affirmative, it is inappropriate for a court to employ any further cost-benefit analysis.

The district court found the service in question to be "medical in nature". We believe the better interpretation of *Tatro* to be that a school district is not required to provide every service which is "medical in nature." The services at issue in *Tatro* could be provided by someone other than a nurse and a lay person, with minimum training, could provide it. *Tatro*, 468 U.S. at 894. It was, therefore, the kind of service that was not unduly expensive or beyond the range of the school system's competence. *Id.* at 892. We believe that it is appropriate to take into account the risk involved and the liability factor of the school district inherent in providing a service of a medical nature such as is involved in this controversy.

#### **IV. THE BURDEN OF PROVIDING THE REQUESTED SERVICE**

Both parties agree that Tennessee law requires that the service requested by Samantha be administered by a physician, registered practical nurse, licensed practical nurse, respiratory care specialist, the patient's relatives or the patient herself. TENN. CODE. ANN. §§ 63-6-402, 63-6-410. Thus, the parties also agree that, unlike *Tatro*, Tennessee law would not allow a school nurse to administer the service in question unless the nurse or medical person possessed the requisite licensing and training. The district court estimated that the cost of hiring a licensed practical nurse was not much more than the cost of hiring a certified nurse's assistant. Thus, the district court found that the burden of providing the requested care was not excessive since Rutherford County had initially agreed to hire such an assistant, including upgrading such assistant to the requisite qualification level.



Rutherford County contends that the district court's finding is clearly erroneous. It notes that both the ALJ and the district court found that Samantha required almost constant care. A nurse or medical attendant would have had to devote virtually all of his or her attention to Samantha. Rutherford County contends that it is inherently burdensome to hire one medical professional to care for a single child, since the cost cannot be reasonably or feasibly distributed over the entire student population. Since Rutherford County originally intended for the nursing assistant in question to assist many different children, defendant maintains that the district court mistakenly assumed that the added cost of providing Samantha the requested care was insubstantial.

Since we agree that the services requested by Samantha are inherently burdensome, we express no opinion about the financial cost of hiring a licensed practical nurse rather than a nursing assistant. The undue burden in this case derives from the nature of the care involved rather than the salary of the person performing it. We are not persuaded by *Department of Education v. Katherine D. ex rel. Kevin & Roberta D.*, 727 F.2d 809, 815 (9th Cir. 1983), a case decided before *Tatro*. The Ninth Circuit held that the Act required a school district to pay for a handicap child's tracheostomy services, since a trained lay person or school nurse was capable of administering the care. *Id.* at 815 n.6. In several decisions since *Tatro*, however, district courts have held that the Act does not require a school district to provide *E.g.*, *Shannon*, 787 F. Supp. at 1030; *Wright*, 666 F. Supp. at 75; *Detsel ex rel. Detsel*, 637 F. Supp. at 1026-27. In *Shannon*, the district court explained:

Shannon's reliance on *Tatro* is misplaced. The differences between the level of care required in *Tatro* and the care required by Shannon are significant. The child in *Tatro* did not require constant monitoring. The CIC procedure, which the child would soon be able to perform herself, could be performed by a lay person a few times a day. In contrast, Shannon requires constant care to monitor and clear her tube. The parties have stipulated that the care of at least a licensed practical nurse is required.

*Shannon*, 787 F. Supp. at 1030.

In *Wright*, the district court explained that [t]he services required are varied and intensive. They must be provided by a nurse, not a lay person. They are time-consuming and expensive. Above all, the life threatening prospect of a mucous plug demands the constant attention of the nurse. Because of this need for constant vigilance, a school nurse or any other qualified person with responsibility for other children within the school could not safely care for Bevin.

It is the "private duty" aspect of Bevin's nursing services which distinguishes this case from. . . *Tatro*. . . and *Katherine D.* [which] all involved intermittent care which could be provided by the school district at relatively little expense in both time and money.

*Wright*, 666 F. Supp. at 75.

Similarly, the district court in *Detsel* noted that [t]he Supreme Court considered the extent and nature of the service performed in the *Tatro* decision. Unlike CIC, the services required by Melissa are extensive. This is not a simple procedure which the child may perform herself. Constant medical monitoring is required in order to protect Melissa's very life. The record indicates that the medical attention required by Melissa is beyond the competence of a school nurse.

*Detsel ex rel. Detsel*, 637 F. Supp. at 1026-27.

We find the reasoning of these decisions persuasive, especially *Wright*. As therein explained, it is the "private duty" component of Samantha's care that is inherently burdensome. In *Katherine D.*, the child required suctioning of her tracheostomy two or three times a day and there was no hint that the child faced life threatening consequences in the even the routine care was not administered promptly. Similarly, the child in *Tatro* required catheterization every three or four hours and the Court did not suggest that the child might die if the school nurse was fifteen minutes late. Unlike this case, neither *Tatro* nor *Katherine D.* involved care of a constant nature or of life-threatening consequences to the student. The district court found that Samantha required almost exclusive medical supervision and that such care was necessary in order to protect Samantha's life. Requiring a school to hire a licensed practical nurse to care for one child is "inherently burdensome" and, undoubtedly, distinguishable from *Tatro*.

Samantha and her parents argue, however, that the district court was clearly erroneous when it concluded that Samantha required constant care and supervision. Samantha's father submitted an affidavit which indicated that, during the previous school year, he and his wife did not actually remain in the classroom with Samantha but waited in an adjacent room with a pager in the event Samantha required medical attention. The district court rejected this contention noting that:

[a]lthough Samantha's father avers, in his supplemental affidavit, that it was not the plaintiffs' intention to request exclusive care for Samantha the evidence presented at the hearing preponderates against any conclusion otherwise. While it is true that a nurse might be able to attend briefly to others in Samantha's room, there is no dispute that Samantha requires constant attention and often one-to-one care. The plaintiffs repeatedly point out in their briefs that Samantha's life-threatening condition requires that Samantha be the attendant's number one priority, and there is no evidence to the contrary.

We believe that the evidence adduced at the administrative hearing was more than sufficient to support the district court's finding. Samantha's father testified that Samantha's breathing tube could be easily dislodged if she coughed, changed her clothing, or even played roughly with other children. He stated that, if the tube was not reinserted within fifteen or twenty minutes, Samantha's carbon dioxide level would rise and she would fall asleep. Once asleep, Samantha would cease breathing and die if respiratory functions were not restored within four

or five minutes. Neely also explained that when Samantha had a cold she required suctioning approximately every twenty minutes. When asked how someone could tell when Samantha needed suctioning, he responded as follows:

I suppose basically you could say you just listen. The sounds that we are listening for is not the same one that you might be. It's just something that you learn or are taught to listen for. Also, I mean, we can tell by her lip color, by her fingernails, just by the way she is acting.

As the district court properly noted, if a nurse attended to the needs of other children, there would be no one present to observe Samantha's behavior, lip and skin color or any other tell-tale signs that Samantha required immediate suctioning.

Since the district court did not give its finding of constant care sufficient weight in its determination that the requested care could be provided without undue burden on the school district, we conclude that it was in error. The care requested by Samantha falls within the "medical services" exclusion to the IDEA. Accordingly, we **REVERSE** the decision of the district court and **AFFIRM** the ALJ's holding for defendant.

**GRANITE SCHOOL DISTRICT,**

*Plaintiff*

v

**SHANNON M.,** a minor, by her parents, Myrna M. and Dan M.,

*Defendant*

No. 90-C-0728-S

U.S. District Court, Utah

March 23, 1992

The district appealed from decisions of a hearing officer and a state review panel requiring full-time nursing care to be provided as a related service during school hours to a six-year-old child who was identified as orthopedically impaired due to severe medical problems. The child breathed through a tracheotomy tube and received her food through a nasogastric tube. Due to frequent mucous plugs in her tracheotomy tube, the child need constant nursing attention throughout the school day, as well as on the school bus, at an approximate annual cost of \$30,000.

*HELD:* for the district.

Overturning the prior administrative decisions, the court held that the *Tatro* decision cannot be read as an endorsement of the proposition that all school health services performed by persons other than licensed physicians are related services under the IDEA. Rather, following the subsequent interpretations of *Tatro* by a majority of courts, the issue of whether a school health service is a related service or an excludable medical service must depend on the amount of care required, the cost of the care, and the burden on the school system and other children. Applying these factors, the court concluded that the constant nursing care required to maintain the child at school was an excludable medical service and not a related service, that the district was not required to provide the care as a supportive service, and that the child count not satisfactorily be educated in the regular education environment.

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**SAM,** District Judge

**Memorandum Decision and Order**

**I. Introduction<sup>1</sup>**

The court has before it the Motion by plaintiff Granite School District ("Granite") for Summary Judgment and the Motion by Shannon M. ("Shannon") to Affirm Judgments of Administrative Hearing officer and of State Review Panel. Shannon also requests attorney's fees. Subsequent to argument on this matter, Shannon also moved the court for rehearing.<sup>2</sup>

In brief, Granite seeks the court's order that federal law does not compel it to provide Shannon full-time nursing care during school hours. Shannon claims that Granite is required by the Individuals with Disabilities Education Act (the "Act"), 20 U.S.C. § 1400 et. seq., to provide the constant tracheostomy care she needs in order to attend school.

The Act provides federal money to state and local agencies to assist them in educating children with disabilities. Receipt of these funds is conditioned on the state's ability to demonstrate that all children with disabilities are assured "the right to a free appropriate public education." 20 U.S.C. § 1412(1). The state is also required, to the extent appropriate, to educate children with disabilities with children who are not handicapped. 20 U.S.C. § 1412(5); 34 C.F.R. §300.550(b)(1)(1991). The education of each handicapped child must be tailored to that child's individual needs through development of an Individualized Education Program ("IEP"), which is prepared at meetings between school personnel, the child's parents, and in some cases, the child. 20 U.S.C. §§ 1401(a)(18), (2), 141(a)(5). Parents who are dissatisfied with their child's IEP are entitled to an impartial due process hearing and can further appeal to a state educational agency. Either the school district or the parents can then appeal to a state court or a federal district court. *Id.* at § 1415(b)(2), (c), (3)(2).

Shannon's parents, following the statute's provisions, requested a due process hearing, claiming that Granite was required under the Act to provide Shannon with nursing care. The Administrative Due Process Hearing Officer, and subsequently, the State Level Review Hearing Panel found that Granite was required to provide full-time nursing service at school as a related service under the Act. Granite has appealed those administrative decisions to this court pursuant to § 1415(e) of the Act.

## **II. Facts**

For purposes of this action, the parties have stipulated to the following facts. Shannon is a six-year old student who attended kindergarten classes at Granite's Orchard Elementary during the 1989-90 school year. She suffers from congenital neuromuscular atrophy and severe scoliosis and is confined to a motorized wheelchair. Shannon is classified as "orthopedically impaired" under the Act. She breathes through a tracheotomy tube in her windpipe, which must be suctioned to loosen mucous and reduce the chances of a potentially life-threatening mucous plug. Shannon also receives her food through a nasogastric tube, which the nurse attends to. Shannon's nurse typically suctions Shannon's tracheostomy tube five times during a three-hour school day, including the bus ride. In spite of suctioning, Shannon's tracheostomy tube occasionally gets a mucous plug. Shannon cannot breathe until the plug is broken up or the tracheostomy tube is changed. When a plug occurs, Shannon's caretaker uses saline solution, tries to suction, and then changes the tube if the first two do not work. Sometimes, Shannon needs an ambu bag (a portable ventilator) to open her lungs if her color is bad and she is not getting enough oxygen. Shannon needs someone available in case she has problems with respiration, suctioning, her nasogastric tube, pain or positioning.

Granite has a "do not resuscitate" order from Shannon's doctor stating that heroic measures are not to be used if Shannon should suffer cardiac arrest. In 1991, Shannon was scheduled to start first grade, which consists of a seven hour day. The parties agree that Shannon should have at least a licensed practical nurse to perform the necessary care.<sup>3</sup> The estimated cost for full time nursing care for the school year is \$30,000.

### **III. Discussion**

The issue before the court is whether the health care, which Shannon needs in order to attend school, must be provided by Granite as part of her free appropriate public education. More specifically, the court must decide whether full time nursing care for Shannon is a supportive service required by the Act, or whether it is a medical

service excluded under the Act.<sup>4</sup> The question is one of law, which the courts reviews de novo.<sup>5</sup>

#### **1. Free Appropriate Public Education**

Receipt of funds under the Act is conditioned on the state's compliance with procedures enumerated within the Act, one of which is that the school must demonstrate that all children with disabilities have the "right to a free appropriate public education." 20 U.S.C. § 1412(1).

A free appropriate public education is defined as "special education and related services." 20 U.S.C. § 1401(a)(18). Special education is defined as "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability, including (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (b) instruction in physical education." 20 U.S.C. § 1401(a)(16). Related services consist of:

[T]ransportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation and social work services, and medical and counseling services, including rehabilitation counseling, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

20 U.S.C. § 1401(a)(17) (emphasis omitted). Related services also has been defined by regulation to include school health services and school health services 'means services provided by a qualified school nurse or other qualified person.' 34 C.F.R. 300.13(b)(10)(1991).

The Act requires that "to the maximum extent appropriate," a child with a disability be mainstreamed or educated with children who are not disabled. 20 U.S.C. § 1412(5). A child is to be removed from the regular classroom environment only when "the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily...." *Id.*

Shannon contends that Granite is required by the Act to provide, as a "related service", the full-time nursing care which she needs in order to attend school. In essence, Shannon argues that she needs tracheostomy care to attend school and she needs to attend school to benefit from her special education.<sup>6</sup>

Granite's position is that the law requires it to provide Shannon with a basic floor of opportunity which she receives through home-bound instruction, rather than maximization of Shannon's potential, which she seeks through full-time nursing care that Shannon is requesting is not required under the Act because full time nursing care is a medical service, beyond diagnosis or evaluation, and is thus excluded under the Act.

## **2. A Basic Floor of Opportunity -- Sufficient Supportive Services to Benefit from Education**

In *Hendrick Hudson Dist. Bd. of Ed. v. Rowley*, 458 U.S. 176 (1982), the Supreme Court recognized that the Act was not intended to guarantee any particular substantive level of education. Rather, the Court noted that what was required was access to education sufficient to provide "some educational benefit."<sup>7</sup> *Rowley* is instructive on "[w]hat is meant by the Act's requirement of a 'free appropriate public education....' And what is the role of ... federal courts in exercising the review granted by 20 U.S.C. § 1415...." *Id.* at 186. In that case, the Court upheld the decision of a school district which had denied requests by Amy Rowley's parents that she be provided with a sign language interpreter in the classroom. The school district had decided to provide an FM hearing aid for the deaf child and thus encourage Amy's self-sufficiency. Amy's parents, who were also deaf, insisted that denial of the interpreter in the classroom denied Amy of a free appropriate public education.

The lower courts focused on the disparity between what Amy could have learned in the classroom if she could hear, and what she was learning at the time. They decided that she was not receiving the required free and appropriate public education, which the district court defined as "an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children." *Id.* at 186 (quoting *Rowley v. Bd. of Ed. of Hendrick Hudson Cent. S.D.*, 483 F. Supp. 528, 534 (M.D. Ala. 1980)).

In reversing, the Supreme Court stated that "if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a 'free appropriate public education' as defined by the Act." *Id.* at 189.<sup>8</sup> The Court specifically found that "the requirement that a State provide specialized educational services to handicapped children generates no additional requirement that the services so provided be sufficient to maximize each child's potential 'commensurate with the opportunity provided other children.'" *Id.* at 198. After examining the legislative history of the Act, the Court "conclude[d] that the 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Id.* at 201. The Court noted that if Congress wants to impose a condition on a grant of federal money to the schools, such as the achievement of each child's maximum potential, it must do so unambiguously. *Id.* at 204, n. 26.

*Rowley* provides a two-part inquiry to be applied by reviewing courts under § 1415 of the Act: (1) Whether the procedural requirements of the Act have been complied with; and (2) Whether the child's IEP is "reasonably calculated to enable the child to receive educational benefits." *Id.* at 206-207. The Court further noted that, once the two requirements are satisfied, "the State has complied with the obligations imposed by Congress and the courts can require no more." *Id.* at 207.

Similarly, in *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984),<sup>9</sup> the Supreme Court applied a two-part inquiry to determine whether a given service is a related service under the Act: (1) Is the care a supportive service necessary to enable a handicapped child to benefit from special education; and, (2) Is the service excluded by the Act as a "medical service" aside from any diagnostic or evaluation purpose. *Id.* at 890.

Amber Tatro was an eight year old girl who suffered from a neurogenic bladder disorder<sup>10</sup> which prevented her from emptying her bladder voluntarily and required clean intermittent catheterization ("CIC") every three or four hours. CIC is "a procedure involving the insertion of a catheter into the urethra to drain the bladder." *Id.* at 885. CIC is a simple procedure and can be performed in minutes by a lay person with very little training. It was expected that Amber herself would soon be able to perform the procedure. *Id.* The Irving Independent School District developed an IEP for Amber which explicitly called for her placement in early childhood development classes but which made no provision for someone to perform CIC. The Supreme Court held that CIC service was a supportive service "required to assist a handicapped child to benefit from special education." *Id.* at 891 (quoting 20 U.S.C. § 1401(a)(17)).

The Court, however, qualified the obligation of schools to provide support service.



To keep in perspective the obligation to provide services that relate to both the health and educational needs of handicapped students, we note several limitations that should minimize the burden petitioner fears. First, to be entitled to related services, a child must be handicapped so as to require special education.

...

Second, only those services necessary to aid a handicapped child to benefit from special education must be provided, regardless [of] how easily a school nurse or lay person could furnish them....

Third, the regulations state that school nursing services must be provided only if they can be performed by a nurse or other qualified person, not if they must be performed by a physician. See 34 C.F.R. §§ 300.13(a), (b)(4), (b)(10) (1983).

*Tatro*, 468 U.S. at 894.

Instructive authority is also found in *Thomas v. Cincinnati Bd. of Ed.*, 918 F. 2d 618 (6th Cir. 1990), in which the Sixth Circuit ruled that a child who required tracheostomy and gastrostomy tube care could gain reasonable benefits from five hours of weekly home instruction even though the school-based program might provide more related services. Emily Thomas was a multi-handicapped child who also breathed through a tracheostomy tube which required constant monitoring and suctioning. *Id.* at 621. Emily's revised IEP called for instruction in the home rather than in the classroom. The district court found that Ohio law reserved home instruction for students who are unable to attend school, and that since Emily could attend school if transported by ambulance, home instruction was not an option. *Id.* at 623. The district court also found that the home instruction option was not the least restrictive environment for Emily and thus an inappropriate placement. *Id.* at 626. In reversing the district court, the Sixth Circuit found that the IEP developed by the school was "reasonably calculated to enable Emily to receive educational benefits." *Id.* at 626 (citing *Rowley*, 458 U.S. 176, 207 (1982) the court reasoned that:

Although it appears that Emily may receive fewer related services at home than at the SMI program, we are not deciding which placement would be more advantageous to Emily's development, only whether the revised IEP will enable her to benefit. All the experts agreed that Emily would benefit educationally from the revised IEP providing for additional home instruction and, indeed, plaintiff does not contend that this IEP is not appropriate, only that it is not as good as the SMI program....Since there is no dispute over whether the revised IEP will enable Emily to benefit educationally, we conclude that the school district has satisfied the Act's substantive provisions.

### 3. Medical Services Exclusion

As noted, the Act requires that all eligible children receive special education and related services which include "supportive services" required by the handicapped child to benefit from his or her special education. However, medical services, except for "diagnostic and evaluation purposes," need not be provided.

In *Tatro*, the Court found that CIC service was not excluded by the medical service provision of the Act. Id. at 890-91.<sup>12</sup> The Court specifically found that CIC services for Araber Tatro were not materially different from services provided to non-handicapped children.<sup>13</sup> Id. at 893.

The specific holding of *Tatro* is that CIC service is a supportive service not subject to the medical services exclusion of the Act. The court does not read *Tatro* to stand for the proposition that all health services performed by someone other than a licensed physician are related services under the Act regardless of the amount of care, expense, or burden on the school system and, ultimately, on other school children.

Other courts interpreting *Tatro* have found Shannon's asserted interpretation,<sup>14</sup> based on the physician-non-physician provider, too narrow. The court concurs with the analysis and authorities set forth in *Clovis Unified School Dist. v. California Office of Adm. Hearings*, 903 F. 2d 635 (9th Circ. 1990). That case involved, inter alia, the issue of whether the school was required by the Act to pay for care of an emotionally disturbed child in a psychiatric hospital as a related service. The parents urged "a narrow definition of medical services, contending that, under *Tatro*, medical services are only those services that must be provided by a licensed physician." Id. at 643. The Court of Appeals for the Ninth Circuit, in rejecting that argument, stated:

A number of District Courts have faced this issue and have concluded that the "licensed physician" distinction is inadequate as the sole criterion for determining when services fall under the medical exclusion from liability. In *Max M. v. Thompson*, 592 F. Supp. 1437 (N.D. Ill. 1984), the District Court held that psychotherapy, a recognized related service under the Act, does not become excluded as a medical service merely because it is provided by a psychiatrist - a licensed physician - rather than by a psychologist. We agree with the reasoning of this opinion, and with its rejection of an arbitrary classification of services based solely on the licensed status of the service provider. If a licensed physician may provide related services without their becoming instantly "medical", we believe that by the same token a program clearly aimed at curing an illness - whether mental or physical - does not become instantly "related" when it can be implemented by persons other than licensed physicians.

The post-*Tatro* case of *Detsel v. Board of Education of Auburn*, 637 F. Supp. 1022 (N.D.N.Y. 1986), *aff'd* 820 F. 2d 587 (2d Cir.), *cert. denied*, 484 U.S. 981, 108 S. Ct. 495, 98 L. Ed. 2d 494 (1987), is even more on point. There a district court found that intensive life support service necessary to maintain a child in school fell outside the "related services" mandated by the Act and "more closely resemble[d] the medical services specifically excluded by § 1407(17) of the [EHA]," despite the fact that the services could be provided by a practical nurse rather than by a physician. *Id.* at 1027. Applying the principles of *Tatro*, the court found that holding the school district responsible for the provision of such "extensive, therapeutic health services" would be contrary to the rationale of the medical services exclusion in the Act, based as it is upon relieving schools of the obligation to provide services calculated to be unduly expensive. *Id.*

We agree with the *Detsel* court, that under the analysis in *Tatro*, the Shorey's argument for limiting medically excluded services to those requiring a physician's intervention must fail. The Court in *Tatro* did not hold that all health services are to be provided as related services so long as they may be performed by other than a licensed physician. 468 U.S. at 891-95, 104 S. Ct. 3376-78; see also *Detsel* 637 F. Supp. at 1027. Rather, the Court held only that services which must be provided by a licensed physician, other than those which are diagnostic or evaluative, are excluded and that school nursing services of a simple nature are not excluded. In reaching this decision the Court considered the extent and nature of the services performed, not solely the status of the person performing the services. We must do the same.

*Id.* at 643-644 (emphasis original).

As discussed in *Clovis, Detsel v. Board of Education of Auburn*, 637 F. Supp. 1022 (N.D.N.Y. 1986), *aff'd*, 820 F. 2d 587 (2nd Cir.), *cert. denied*, 484 U.S. 981 (1987), is a case more analogous to the present factual situation. In that case, the court found that the tracheostomy nursing services required by Melissa Detsel were constant and could not be provided by a regular school nurse who must care for other children. The evidence was that a school nurse was not always and adequately available and that the constant care of a licensed practical nurse or registered nurse was required. In concluding that tracheostomy nursing care was not a related service under the Act because of the medical services exclusion, the court distinguished cases requiring less expertise and intermittent, rather than constant, care.

*Bevin H. v. Wright*, 666 F. Supp. 71 (W.D. Pa. 1987), another case factually similar to Shannon's, provides additional guidance. Bevin was a seven year old girl with numerous disabilities. She breathed through a tracheostomy tube, and was fed and medicated through a gastrostomy tube. Bevin had six classmates who also breathed through tracheostomies, but, unlike Bevin, none of them required constant care. The evidence was that a nurse must remain with Bevin "at all times because of the constant possibility

of a mucous plug in the tracheostomy tube." *Id.* at 73. The court found that the services required went far beyond those required under *Tatro*, concluding that "to place that burden on the school district in the guise of 'related services' does not appear to be consistent with the spirit of the Act and the regulations." *Id.* at 75. The *Bevin* court went on to fortify its conclusion, citing to *Rowley*, and noting that "[a]lthough the Act presumes that all handicapped children are entitled to some form of education tailored to their individual needs and abilities, it does not require school districts to provide the best possible education without regard to expense." *Id.*

The case authority, in addition to *Tatro*, cited by Shannon for the proposition that full-time nursing care is a related service, in the court's view, is factually distinguishable. For example, in *Department of Education, State of Haw. v. Katherine D.*, 727 F.2d 809 (9th Cir. 1983), *cert. denied*, 471 U.S. 1117 (1985), the Court of Appeals for the Ninth Circuit found that a school district was required to provide nursing care for Katherine D., who breathed through a tracheostomy tube but only required care for her tube two or three times during the school day. The court found that this intermittent care "could have been made available in a public school setting without unduly burdening the school system" and was thus required by the Act. *Id.* at 815. Where Katherine D. only required care two or three times a day, Shannon requires constant care.

Shannon also relies on *Macomb County Intermediate School Dist. v. Joshua S.*, 715 F. Supp. 824 (E.D. Mich. 1989), for the proposition that tracheostomy care is a supportive service rather than an excluded medical service. In *Joshua S.*, the Board of Education filed an action seeking a determination of whether it was required to provide Joshua S., a handicapped student, with transportation to and from school. The school district had already determined that it would provide services for the child at school. Under state regulation there was no home study option available to Joshua S. *Id.* at 827. The court found that such care did not fall under the 'medical services' exclusion, which the court, relying on *Tatro*, construed to include only "services provided by a licensed physician." *Id.* at 828. It specifically rejected the analysis of courts coming to a different conclusion, finding that they ignored the spirit of the Act, which was to "guarantee handicapped students an opportunity to gain an education." *Id.* at 826.

*Joshua S.* is factually distinguishable from the situation of Shannon. As the court noted, due to Michigan state regulations, Joshua S. was not eligible for homebound instruction. In light of that fact, the court stated: "Common sense, then, leads to the conclusion that transportation and the incidents thereto are necessary to fulfill the plaintiff's obligation to the defendant under the EAHCA [the Act]." *Id.* at 827. In the case of Shannon, Granite has made home instruction available to her.

#### **4. Application of the Law**

The fact that the procedural requirements of the Act have been complied with is not materially disputed by either party.<sup>15</sup> Shannon asserts that it is the second prong of the *Rowley* inquiry, whether the IEP is reasonably calculated to enable the child to receive educational benefits, that has been violated by Granite in that her IEP is not reasonably calculated to enable her to receive educational benefits. Shannon's IEP calls for homebound instruction.

As discussed herein the Supreme Court in *Rowley* pronounced that the child's opportunities need not be maximized, but found that the Act requires a basic floor of opportunity be met. *Rowley*, 458 U.S. at 200. The Court stated that "if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction ... the child is receiving a 'free appropriate public education' as defined by the Act." *Id.* at 189. See also *Tatro*, 468 U.S. 883, 890 (1983) (court must determine if care is supportive service required for handicapped child to benefit from instruction) There is no dispute that Shannon receives personal instruction at home. There is no evidence that Shannon is not receiving some educational benefit from her personal instruction at home. There is no question, and Granite does not dispute, that Shannon would receive more educational benefit by having full-time nursing care which would permit her to attend school. Arguably, all medical services, including the nursing care requested by Shannon, are supportive of a handicapped child's education. However, the focus of the law is whether Granite is providing Shannon with sufficient supportive services to permit her to receive some benefit from her instruction.

The court is of the view that the basic floor of opportunity, as required by the Act, has been provided to Shannon. In the court's opinion, Shannon's IEP confers some educational benefit on her. No evidence to the contrary has been presented. The Act and the controlling case authority require that a child with a disability be provided with sufficient supportive services to enable the child to benefit from instruction. This Granite has done. The court, therefore, is of the opinion and finds that Granite has complied with the law. The Supreme Court has warned the courts not to interfere in the state's authority to run the schools and has limited the courts' power to intervene.<sup>16</sup>

*Rowley*, 458 U.S. at 207. The Court further stated:

We previously have cautioned that courts lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy.' ... We think that Congress shared that view when it passed the Act ... Therefore, once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the State.

*Id.* at 208.

The decision of Granite, with respect to Shannon's instruction, must, therefore, be deferred to inasmuch as the tests set out by the Act and by the supreme Court have been satisfied.

The court acknowledges the preference of Congress, manifest in the Act,<sup>17</sup> to mainstream children with disabilities into the regular classroom. However, the Act also provides for the child's removal from regular classes if the child's education cannot be achieved satisfactorily. 20 U.S.C. § 1412(5)(b). The harsh reality of Shannon's case is that she requires the full-time care of at least a licensed practical nurse because of the constant possibility of a mucous plug in her tracheostomy tube. Such a plug is common, occurring a number of times each day. Without the appropriate care, Shannon's disability becomes life threatening. The record reflects that Granite's three school nurses must serve 75,000 children in more than ninety schools and, therefore, are not reasonably available to provide Shannon with constant care. The cost to Granite of providing Shannon with constant nursing care is estimated at \$30,000 a year.<sup>18</sup> The expense of providing Shannon's requested care would undoubtedly take money away from other programs. The court's decision must be tempered by paramount concern for Shannon's safety and by the Act's principle goal of providing a free appropriate public education for all handicapped children. *Lackman v. Illinois State Bd. of Ed.*, 852 F. 2d 290 (7th Cir. 1988); *Wilson v. Morona Unified School Dist.*, 735 F. 2d 1178 (9th Cir. 1984). Accordingly, the court is further of the opinion and finds that Shannon's mainstreaming cannot be "achieved satisfactorily."

As an additional basis for its ruling that Granite is not required by Federal law to provide Shannon with the requested care, the court is also of the opinion and finds that the constant nursing/tracheostomy care requested by Shannon falls within the medical services exclusion of the Act, and, therefore, it is not a service that Granite must provide as a matter of federal law. The court rejects the narrow construction of the medical services exclusion of the Act based on the licensed physician distinction asserted by Shannon. Shannon's reliance on *Tatro* is misplaced. The differences between the level of care required in *Tatro* and the care required by Shannon are significant. The child in *Tatro* did not require constant monitoring. The CIC procedure, which the child would soon be able to perform for herself, could be performed by a lay person a few times a day. In contrast, Shannon requires constant care to monitor and clear her tube. The parties have stipulated that the care of at least a licensed practical nurse is required. The testimony presented at the administrative hearing reflects that the constant care required by Shannon cannot be provided by Granite's three school nurse, who have responsibility for 75,000 other children in ninety schools within the district.

#### **IV. Conclusion**

There is no dispute in this case as to the facts. The only question is one of law. Due weight has been given to the administrative proceedings and their findings. However, the court is of the opinion that the Administrative Hearing officer and State Review Panel have not applied the case law necessary to interpret the sometimes cryptic statute.

Upon de novo review, and after considering the extent and nature of the services requested by Shannon, the relevant statutory and case authority, and the evidence properly before it, the court concludes that the Act does not require Granite to provide Shannon with full-time nursing/tracheostomy care as a supportive service. The court further concludes that Shannon cannot satisfactorily be mainstreamed or educated with children who are not disabled. The services requested by Shannon are also found not to be a related service under the medical services exclusion of the Act.

The court having found that Federal law does not compel Granite to provide full time nursing care to Shannon, her motion to affirm is DENIED. In view of the court's decision in this case, Shannon is not a prevailing party entitled to attorney's fees under 20 U.S.C. § 1415(4)(B), and her request for attorney's fees is therefore DENIED. Shannon's Motion for Rehearing is also DENIED. See note 2. Granite's motion for summary judgment is GRANTED.

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<sup>1</sup> The court acknowledges the good faith and desire of all parties to secure for Shannon M. the proper care and most appropriate education possible under the relevant facts and law. That this common desire has led to differences in opinion as to that care and education, speaks no less highly of the concern exhibited by all involved. The court wishes to compliment the parties and counsel for the professional and caring way in which this matter has been presented to the court.

<sup>2</sup> On December 13, 1991, subsequent to oral argument and subsequent to the court orally informing the parties of its disposition that the requested nursing care is not a related service under the Individuals with Disabilities Education Act, Shannon moved the court for rehearing based upon a change in regulations governing the availability of private duty nursing service in a school setting, the cost of which can now be covered by Medicaid reimbursement. Granite's opposing memorandum was filed on January 15, 1992 and Shannon's reply memorandum was filed January 24, 1992. The gist of Shannon's motion is that cost appears no longer to be a factor and, therefore, Granite's opposition to providing care is moot or, at least, analytically flawed. The court, however, agrees with Granite's position that a change in Medicaid policy has no impact on what constitutes a related services under the Individuals with Disabilities Education Act. The new are authorized to receive private duty nursing services" may use those services in a school setting. *Pullen v. Cuomo*. 18 IDELR 132, 133 (N.D.N.Y. August 7, 1991). The policy does not expend conditions of entitlement or amount of service.

<sup>3</sup> Although Shannon's parents have stated that they are not concerned with who provides the care, so long as it is provided, they have stipulated, for purposes of this action, that the care of at least a licensed practical nurse is required.

<sup>4</sup> Shannon asserts that the issue before the court is whether tracheostomy care and nasogastric feeding tube care, not full-time nursing care, is a related service under the Act. Inasmuch as the parties have stipulated that Shannon's tracheostomy and nasogastric tube care should be performed by either a licensed practical or a registered nurse, the court finds no relevant distinction between the issue posed by Granite and that argued by Shannon.

<sup>5</sup> In reviewing the complaint, the Act provides that a court 'shall receive the record of the [state] administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.' § 1415(e)(92). *Hendrick Hudson Dist. Bd. of Ed. v. Rowley*, 458 U.S. 176, 205 (1982). A district court reviews cases brought under the Act de novo, while being advised to give due weight to the administrative proceedings provided for under the Act. *Id.* at 205-206. The Supreme Court's admonishment to lower courts is that "once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the State." *Id.* at 208.

<sup>6</sup> Specifically, Shannon contends that, if she is unable to attend school, she will not have access to physical, consultative, and occupational therapy and other services enumerated on her IEP.

<sup>7</sup> In *Rowley*, the Court stated: "Implicit in the congressional purpose of providing access to a 'free appropriate education' is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child." *Rowley*, 458 U.S. at 200. Earlier in its opinion, the Court noted: "That the Act imposes no clear obligation upon recipient States beyond the requirement that handicapped children some form of specialized education is perhaps best demonstrated by the fact that Congress, in explaining the need for the Act, equated an 'appropriate education' to the receipt of some specialized educational services." *Id.* at 195.

<sup>8</sup> The Court further stated:

When the language of the Act and its legislative history are considered together, the requirements imposed by Congress become tolerably clear. Insofar as a State is required to provide a handicapped child with a 'free appropriate public education,' we hold that it satisfies this requirement by providing instruction with sufficient support services to permit the child to benefit educationally from that instruction.

*Rowley*, 458 U.S. at 203.

<sup>9</sup> Shannon relies on the facts and analysis of *Tatro* to urge that tracheostomy care, including nasogastric feeding, is a related service to enable her to benefit from her special education.

<sup>10</sup> Amber Tatro was born with a defect known as spina bifida. In addition to a neurogenic bladder, she also suffered from orthopedic and speech impairments. *Tatro*, 486 U.S. at 895.

<sup>11</sup> The court acknowledges that in this case Shannon asserts that her IEP is not appropriate.



- <sup>12</sup> The Court noted that regulations of the Secretary of Education, which are entitled to deference, had already determined that "the services of a school nurse otherwise qualifying as a 'related service' are not subject to exclusion as a 'medical service' but that the services of a physician are excludable as such." *Tatro*, 468 U.S. at 892. The Court acknowledged that "[a]lthough Congress devoted little discussion to the 'medical services' exclusion, the Secretary could reasonably have concluded that it was designed to spare schools from an obligation to provide a service that might well prove unduly expensive and beyond the range of their competence." *Id.* at 892.
- <sup>13</sup> The Court stated: "Nursing in petitioner School District are authorized to dispense oral medications and administer emergency injections in accordance with a physician's prescription. This kind of service for nonhandicapped children is difficult to distinguish from the provision of CIC to the handicapped. It would be strange indeed if Congress, in attempting to extend special services to the handicapped, were unwilling to guarantee them services of a kind that are routinely provided to the nonhandicapped." *Tatro*, 468 U.S. at 893-894.
- <sup>14</sup> Shannon asserts that "if a nurse is able to provide the service, this service, is a supportive service, which is not excluded as a 'medical service.' If a physician must provide the service, this service is considered to be of a medical nature and is therefore excluded under the Act. "Defendant's Memorandum in Support, p. 22.
- <sup>15</sup> Granite has, however, disputed the fairness of the due process hearing based on the allegation that members of the panel were employed as special education teachers and, as such, had previously decided a similar issue. Granite also disputes the testimony permitted in the hearing that a nine-year old could provide the care needed, when the parties had previously stipulated that a nurse was required to provide this care.
- <sup>16</sup> The Supreme Court has stated:  
In assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child.
- <sup>17</sup> 20 U.S.C. § 1412(5)(B) provides that the State establish:  
procedures to assure that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.
- <sup>18</sup> Granite asserts that there are at least eight children in the district waiting for the outcome of this action in order to demand full-time nursing care.



























































**DEPARTMENT OF EDUCATION, STATE OF HAWAII,**

*Plaintiff*

v.

**KATHERINE D., a minor, By & Through her natural parents & legal guardians, KEVIN & ROBERTA D.,**

*Defendants-Counter claimants-Appellees*

**DEPARTMENT OF EDUCATION, STATE OF HAWAII & DONNIS THOMPSON, in her capacity as Superintendent of**  
**Education,**

*Counter claimants-Defendants-Appellants*

No. 82-4096

United States Court of Appeals, Ninth Circuit

Decided November 7, 1983

As Amended February 24, 1984

Appeal from the United States District Court for the District of Hawaii

Affirmed in part and reversed in part

CANBY, NORRIS and REINHARDT, Circuit Judges

NORRIS, Circuit Judge

Counsel for Counter claimants-Defendants-Appellants: Charleen M. Aina, Esq., Honolulu, HI.

Counsel for Defendants-Counter claimants-Appellees: Paul Alston, Esq., Honolulu, HI.

Hawaii SEA appeals from district court judgment holding it responsible for handicapped student's private school tuition, 1981-82 EHLR DEC. 553:529. Student, who suffers from cystic fibrosis and tracheomalacia, requires periodic medication, suctioning of her lungs and reinsertion of her tracheostomy tube. For 1980-81 school year, department of education determined that services could not be provided at a public school and proposed a homebound program consisting of speech therapy and parent counseling. Parents rejected this proposal, initiated a due process hearing, and continued student's attendance at private child care center, in which she had been enrolled since 1979. Hearing officer, concluding that placement offer did not constitute FAPE because it did not provide for placement in the least restrictive environment, ordered department to pay for student's attendance at private school. Department refused and appealed decision; parents counterclaimed for enforcement of decision, attorney's fees and costs. Department then submitted an IEP for the 1981-82 school year, proposing placement in public school with emergency health services, if needed, through school staff. Parents accepted this proposal, but during training of school staff by student's physician, some staff indicated reluctance to perform services and, thereafter, three employee unions filed grievance seeking clarification of whether their contracts required performance of services. Parents then continued student's placement at private

school. District court affirmed hearing officer's findings for 1980-81 school year and held that department had not offered appropriate education for either 1980-81 or 1981-82 school year. It ordered department to reimburse private school costs for both years and granted parents' request for attorney's fees.

*HELD*, affirmed in part and reversed in part.

EHA contains no requirement that handicapped student be provided the best possible education; education agency is required to make only those efforts to accommodate student's needs that are within reason, given budgetary constraints limiting resources that realistically can be committed to special education programs.

Education agency's proposed placement of handicapped student requiring intermittent tracheostomy in regular school program, with training of school staff to respond to her medical needs, constituted offer of free appropriate public education in absence of sufficient evidence that related services would not have been carried out competently and in good faith.

Education agency's proposed placement of handicapped student requiring intermittent tracheostomy in homebound program consisting of speech therapy and parent counseling, without any academic instruction, did not constitute offer of free appropriate public education in the least restrictive environment where evidence indicated that student was clearly capable of participating in regular classes with nonhandicapped children if provided required related services.

Unexplained failure of education agency to offer a child a placement in a classroom with his peers when the child has clearly demonstrated his ability to function in a classroom environment entitles the child to recover, under EHA, 20 U.S.C. § 1415(e)(2), the cost of a private school education until an appropriate program is devised.

State's decision to participate in a federally funded and regulated program to provide special education programs for its handicapped children constitutes waiver of its 11th Amendment immunity against suit.

Complex provisions of EHA § 1415, which establish detailed procedures for administrative and judicial review of a state's proposals to educate handicapped children, create a comprehensive and exclusive remedial scheme that precludes reliance upon a cause of action under the Civil Rights Act, 42 U.S.C. § 1983; therefore, plaintiff may not assert a claim necessary to support an award of attorney's fees under § 1988.

In the face of the comprehensive remedial provisions of EHA, it must be concluded that Congress foreclosed persons complaining of conduct protected by EHA from asserting claims

under the Rehabilitation Act, 29 U.S.C. § 794; therefore, plaintiff may not recover attorney's fees under § 794a(b) of the Rehabilitation Act.

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The Department of Education of the State of Hawaii (DOE), appeals from a district court judgment, 531 F. Supp. 517, holding it responsible for Katherine D.'s tuition at a private school. For the school years 1980-81 and 1981-82, Katherine had sought the "free appropriate public education" to which she was entitled under the Education for All Handicapped Children Act of 1975 (EAHCA or Act), 20 U.S.C. § 1401 *et seq.* (1976). The district court found that the DOE's offers of education for both years were inadequate under the Act and that, consequently, Katherine's parents were entitled to tuition reimbursement for the private school Katherine attended during that time. We affirm the district court's judgment as to the 1980-81 school year but reverse the 1981-82 component. We also reverse the district court's award of attorney's fees.

## I. Facts

Katherine, who was born in 1976, suffers from cystic fibrosis and tracheomalacia, which cause her windpipes to be floppy instead of rigid. Since 1978, Katherine has worn a tracheostomy tube, which allows her to breathe and to expel mucus secretions from her lungs two or three times a day. She is unable to vocalize normally, but has received speech therapy and since February 1981 has been able to speak very softly.

In the summer of 1980, Katherine was certified by the DOE as eligible for special education services under the EAHCA. As required by the Act, the DOE offered an Individualized Educational Program (IEP) to Katherine prior to the beginning of the 1980-81 school year. Based on the recommendation of its physician, the DOE determined that the medical services Katherine might require could not be provided at a public school and therefore proposed a homebound program consisting of speech therapy and parent counseling. Katherine's parents rejected the IEP and initiated a due process hearing under the provisions of 20 U.S.C. § 1415(b)(2). During the course of that proceeding, Katherine continued to attend St. Philomena's Child Care Center, where she had been enrolled since 1979. Katherine's attendance at this private preschool was contingent on the presence of her mother. Mrs. D. was a teacher at St. Philomena's and thus was always available to provide for Katherine's health needs.

In October 1980 the administrative hearing officer decided that the DOE's offer of a homebound program did not constitute a "free appropriate public education" as required by section 1412(1) of the EAHCA because it did not provide for Katherine's placement in the "least restrictive environment" possible. He concluded that Katherine should continue to attend St. Philomena's and ordered the DOE to pay for her tuition there. The DOE refused to follow the hearing officer's order and, in November 1980, filed a petition for review by the district court under 20 U.S.C. § 1415(e)(2). Katherine counterclaimed for enforcement of the hearing officer's order, attorneys' fees, and costs.

After the hearing officer had reached a decision, but before the trial in the district court, the DOE submitted an IEP for the 1981-82 school year to Katherine's parents. Under this IEP, the DOE proposed that Katherine attend Moanalua Elementary School and receive emergency health services, when needed, through the school's staff. The IEP outlined a plan to train the staff to dispense Katherine's medication, suction her lungs, and reinsert her tube should it become dislodged. The first of two planned training sessions was conducted by Dr. Light, Katherine's physician, on September 9, 1981.

During this training session, Dr. Light formed the impression that the staff was reluctant to perform the necessary emergency health services for Katherine. He consequently recommended that Katherine not be sent to Moanalua.

A short time later, three unions representing Moanalua employees filed grievances with the DOE seeking clarification whether their contracts required them to perform health services for Katherine or similarly situated students. Those grievances had not been resolved by the time of trial.

The district court affirmed the findings of the hearing officer as to the 1980-81 school year and held that the DOE had not made an adequate offer for a "free appropriate public education" for either 1980-81 or 1981-82. The district court thus ordered the DOE to reimburse Katherine's parents for the cost of enrolling her in private school during both years,<sup>1</sup> and granted attorneys' fees to appellees. The DOE appeals on all accounts.

## II. Did the DOE Offer Katherine a "Free Appropriate Public Education"?

The EAHCA "both funds and regulates state assistance to handicapped students." *Mountain View-Los Altos Union High School Dist. v. Sharron B.H.*, 709 F. 2d 28, 29 (9th Cir. 1983). Under section 1412(1) of the EAHCA, a state may qualify for federal assistance for special education programs only if it "has in effect a policy that assures all handicapped children the right to a free appropriate public education." The term "free appropriate public education" is defined as special education plus such "related services" "as may be required to assist a handicapped child to benefit from special education." 20 U.S.C. § 1401 (17), (18). The term "related services" is further defined by regulation to include "school health services," *i.e.*, "services provided by a qualified school nurse or other qualified person." 34 C.F.R. § 300.13(b)(10) (1982). Katherine's need both for speech therapy and for maintenance of her tracheostomy tube falls within these definitions. *See Hymes v. Harnett County Board of Education*, 664 F. 2d 410 (4th Cir. 1981) (replacement of tracheostomy tube and suctioning of mucus assumed to be "related services" school board was obligated to provide). Under section 1412(5)(B) of the Act, furthermore, participating states must establish "procedures to assure that, to the maximum extent appropriate, handicapped children...are educated with children who are not handicapped," and that handicapped children are not removed from the "regular education environment" unless "the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily...."

These provisions set forth the DOE's obligations in offering Katherine a special education program under the EAHCA. Noticeably absent from the Act is any requirement that the DOE provide the best possible education for the eligible handicapped child. Because budgetary constraints limit resources that realistically can be committed to these special programs, the DOE is required to make only those efforts to accommodate Katherine's needs that are "within reason." *Tokarcik v. Forest Hills School Dist.*, 665 F. 2d 443, 455 (3d Cir. 1981), *cert. denied*, 458 U.S. 1121, 102 S. Ct. 3508, 73 L.Ed.2d 1383 (1982) (related services). As noted by the Supreme Court in its first interpretation of the terms of the EAHCA,

furnishing handicapped children with only such services as are available to nonhandicapped children would in all probability fall short of the statutory requirement of "free appropriate public education"; *to require, on the other hand, the furnishing of every special service necessary to maximize each handicapped child's potential is, we think, further than Congress intended to go.*

*Board of Education v. Rowley*, 458 U.S. 176, 198, 102 S. Ct. 3034, 3047, 73 L.Ed. 2d 690 (1982) (emphasis added) (holding that the EAHCA does not require the states "to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children"). The Court concluded

that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

*Id.* at 201, 102 S. Ct. at 3048. *See also Doe v. Anrig*, 692 F. 2d 800, 806 (1st Cir. 1982) (in determining appropriate placement of an individual handicapped child, the child's needs must be weighed against the realities of limited public monies).

We turn now to a consideration of the appropriateness of the IEP's the DOE offered to Katherine D.<sup>2</sup> In determining whether the DOE's proposed programs met the statutory standard, we consider the two relevant school years separately because the programs offered in 1980-81 and 1981-82 were significantly different. We hold that the DOE's offer for 1980-81 was inadequate but that the 1981-82 plan offered Katherine a "free appropriate public education."

#### A. 1981-82 School Year<sup>3</sup>

For the 1981-82 school year, the DOE offered to enroll Katherine in a regular public school program and to train the school staff to respond to her medical needs. The district court held that this offer did not satisfy the EAHCA's "free appropriate public education" requirement because

the attitude of the school's personnel toward the plan made it completely unworkable and ineffectual [and] the



plan self-destructed with the filing of the grievance by the school administrators and teachers involved.

Appellees agree with the district court's conclusion, arguing that the 1981-82 plan was inadequate solely because school personnel were reluctant to administer the necessary emergency health services.

We do not agree with the district court that the 1981-82 IEP was so flawed that it failed to satisfy the statutory standard of a "free appropriate public education." The 1981-82 plan met the explicit requirements of the EAHCA and its implementing regulations.<sup>4</sup> Katherine was to attend a regular public school and to receive emergency health services through the school's personnel when required. The district court's conclusion that staff reluctance made this plan unworkable is based upon only two pieces of evidence: first, the testimony by Katherine's physician that he overheard two unidentified teachers expressing hesitation about administering medical services to Katherine, and second, the grievance petition filed by three unions representing teachers and principals. This evidence was insufficient to support the district court's conclusion that the DOE would not provide the health services Katherine required.<sup>5</sup>

The grievance petitions sought clarifications whether the services Katherine might require fell into the category of "medical services" that were outside the school staffs' contractual responsibilities. It is totally conjectural to assume from this, however, that the teachers would have refused to aid Katherine if ordered by their supervisors to perform the services pending final resolution of the grievance. Nor is there any evidence that the teachers were not competent to provide the care Katherine would have required. Finally, there is no evidence that the school board would not have arranged for special personnel to provide the emergency services if the union ultimately prevailed in the contract dispute and the teachers were not required to comply with orders to attend to Katherine's needs.

In sum, the record before us contains insufficient evidence that Katherine would not have received emergency care when needed or that the DOE's proposed plan had "self-destructed." Taking that plan at face value and presuming, as we must in the absence of evidence to the contrary, that it would have been carried out competently and in good faith, we hold that the DOE offered Katherine a "free appropriate public education" for the 1981-82 school year.

#### B. 1980-81 School Year

For 1980-81, the ODE offered Katherine a homebound program consisting of one and one-half hours of speech therapy and forty minutes of parent counseling per week. No academic instruction was offered. Nor was any effort made to ensure that Katherine would be educated in a school "with children who are not handicapped." 20 U.S.C. § 1412(5)(B). The DOE claimed in its own defense that Katherine's handicap was so severe "that education in regular classes with the use of supplementary aids and services [could not] be achieved satisfactorily." 20

U.S.C. § 1412(5)(B). The district court agreed, and held that "the home treatment program offered by the DOE in this case does not satisfy the concept of the 'least restrictive environment' prescribed by the federal regulations." 531 F. Supp. at 525.

We agree with the district court. Katherine was clearly capable of participating in regular classes with nonhandicapped children. She had attended St. Philomena's for a full year prior to requesting admission to public school. As the DOE's proposal for the 1981-82 school year demonstrates, furthermore, services similar to those provided by Katherine's mother at St. Philomena's could have been made available in a public school setting without unduly burdening the school system. See *supra* p. 812. These services could have been provided by a "school nurse or other qualified person,"<sup>6</sup> and thus fell squarely within the requirements of the Act. See 34 C.F.R. § 300.13(b)(10)(1982).

For these reasons, we hold that because the DOE did not make adequate efforts to place in a regular educational environment, the 1980-81 IEP did not offer her a "free appropriate public education" within the meaning of the Act.

### III. Tuition Reimbursement for the 1980-1981 School Year

The hearing officer ordered the DOE to reimburse Katherine for her private school tuition for the 1980-81 school year, acting under his "power to order any educational program for the child," 42 Fed. Reg. 42,476, 42,512 (1977), and, if necessary, to require placement in a private school at no cost to the parent. *Id.* at 42,510; S. Rep. No. 168, 94th Cong., 1st Sess., reprinted in 1975 U.S. Code Cong. & Ad. News 1425, 1426. The district court affirmed. The DOE challenges the district court's affirmance of the hearing officer's award on two grounds:<sup>7</sup> first, that reimbursement of tuition for Katherine's attendance at a private school during 1980-81 pending resolution of a dispute over the IEP for that year is not an available remedy under the EAHCA; and second, that any money judgment against the DOE is barred by the eleventh amendment.

#### A. Statutory Remedies

The DOE here insists that appellees are not entitled to reimbursement for Katherine's private school tuition for the 1980-81 school year because the remedies available for violations of the EAHCA are limited to prospective relief.<sup>9</sup> Appellees in turn contend that the language of section 1415(e)(2) of the Act, giving the reviewing court authority to grant "such relief as ... is appropriate," supports the district court's retroactive award of the costs of Katherine's attendance at St. Philomena's during 1980-81.

The seminal case on the availability of reimbursement as a remedy under the EAHCA is *Anderson v. Thompson*, 658 F. 2d 1205 (7th Cir. 1981).<sup>9</sup> There, the Seventh Circuit held that despite the broad language of section 1415(e)(2), the legislative history of the Act demonstrates that the statute "was intended in most cases to provide only injunctive

relief as a final procedural safeguard that would ensure an appropriate educational program for a handicapped child." *Id.* at 1210-11. Despite this general rule, the court recognized that damages might be recoverable in certain "exceptional circumstances," and cited illustratively two situations "in which a limited damage award might be appropriate": first, when the "child's physical health would have been endangered had the parents not made alternative arrangements to those offered by the school system," and second, when the "defendant has acted in bad faith by failing to comply with the procedural provisions of [the Act]." *Id.* at 1213-14.<sup>10</sup> The court believed these cases to be "exceptional" because

[i]n those situations it is likely that Congress, though generally requiring that a child remain in his current placement, 20 U.S.C. § 615(e)(3), would have intended that parents take action to provide the necessary services for their children without awaiting the outcome of lengthy administrative and judicial proceedings. Parents should then be compensated for the costs of obtaining those services that the school district was required to provide.

*Id.* at 1213 (footnote omitted).

We recognize that Katherine's situation does not fit the precise facts of either of the illustrative exceptions mentioned in *Anderson*<sup>11</sup>. Nonetheless, we believe that the DOE's behavior in this case therefore also involves "exceptional circumstances." We hold that an unexplained failure to offer a child placement in a classroom with his peers when the child has clearly demonstrated his ability to function in a classroom environment entitles the child to recover the cost of a private school education until an appropriate program is devised.

The congressional preference for educating handicapped children in classrooms with their peers is made unmistakably clear in section 1412(5)(B) of the Act, which provides that "to the maximum extent appropriate," handicapped children should be integrated into a regular educational environment. Although the statute does not require "mainstreaming" in every case, it is fundamental to the scheme and purpose of the Act that handicapped children be provided the same educational opportunity and exposure as those children who are not so disadvantaged. *See, e.g., Tokarcik v. Forest Hills School Dist.*, 665 F. 2d 443, 458 (3d Cir. 1981), *cert. denied*, \_\_\_ U.S. \_\_\_, 102 S. Ct. 3508, 73 L.Ed.2d 1383 (1982) ("given the advantages of placement in as normal an environment as possibly, to deny a handicapped child access to a regular public school classroom without a compelling educational justification constitutes discrimination and a denial of statutory benefits"); *Gladys J. v. Pearland Independent School Dist.*, 520 F. Supp. 869, 874 n. 5 (S.D. Tex. 1981) ("[m]ainstreaming is clearly a predominant thesis underlying the EAHCA"). The DOE's own regulations recognize and implement this congressional preference:

Hospitalized and homebound care should be considered to be among the least advantageous education arrangements [and are] to be utilized only when a more

normalized process of education is unsuitable for a student who has severe health restrictions.

Department of Education, *Program Standards and Guidelines for Special Education and Special Services, Programs and Services for the Orthopedically Handicapped and Other Health Impaired*, paras. 27, 29, 30. We thus believe that this is also a case where "Congress...would have intended that parents take action to provide the necessary services for their children." *Anderson*, 658 F. 2d at 1213.

Consequently, we find no error in the district court's award of the cost of Katherine's private school tuition for the 1980-81 school year. Because the DOE failed to offer her a placement with her peers, notwithstanding her undisputed ability to function in a regular classroom environment, Katherine's continued attendance at St. Philomena's during the 1980-81 school year was the only feasible way her parents could assure her the benefits of the regular educational environment to which she was entitled.

Our holding is not inconsistent with those cases in which damages have been denied. As far as we can determine from often limited statements of fact, in no other case did a court consider a situation in which a state education agency offered a homebound program to a child who was clearly capable of functioning in a classroom setting. In *Mountain View-Los Altos Union High School Dist. v. Sharron B.H.*, 709 F.2d 28 (9th Cir. 1983), for instance, our court denied reimbursement for private school tuition because the procedure for assessing the child's health and education needs had not yet been completed. *Id.* at 30. In *Anderson*, the court refused to award damages when the parents of a handicapped child refused the placement in a public school classroom that was offered to her, and instead requested reimbursement of her tuition at a private school. 658 F.2d at 1207. Similarly, in *Stemple v. Board of Education*, 623 F.2d 893 (4th Cir. 1980), *cert. denied*, 450 U.S. 911, 101 S. Ct. 1348, 67 L.Ed.2d 334 (1981), the court denied reimbursement to parents who unilaterally decided to transfer their handicapped child to a private school when they found her progress in the offered public school placement to be too slow. Because these cases did not involve "exceptional circumstances" to support an award of damages, they are distinguishable from Katherine D.'s situation. We thus hold that if education agencies fail to offer a classroom program to a handicapped child who has clearly demonstrated his ability to function in a normal classroom environment, leaving a private school placement as the only feasible means for satisfying the congressional preference that handicapped children be placed in the least restrictive environment, the state must pay the costs of that placement until an appropriate program is devised.

#### B. Eleventh Amendment Issue

The DOE also claims that the award of Katherine's school costs violates the eleventh amendment.<sup>12</sup> We disagree. Because the State of Hawaii chose to participate in a

federally funded and regulated program to provide special educational programs for its handicapped children, we hold that it waived its eleventh amendment immunity against suit.

The Supreme Court has made clear that a state waives its eleventh amendment immunity by engaging in an activity regulated by Congress when Congress has constitutional authority to enact the regulatory statute, and that statute authorizes suits against the state. See e.g., *Parden v. Terminal Ry. of Alabama State Docks Dept.*, 377 U.S. 184, 84 S. Ct. 1207, 12 L.Ed.2d 233 (1964), In *Parden*, the Court held that "Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the [Federal Employers Liability Act]," *id.* at 192, 84 S. Ct. at 1212, and that "[the state], when it began operation of an interstate railroad...necessarily consented to such suit as was authorized by that Act." *Id.* at 192, 84 S. Ct. at 1212.

Because, however, the states have "long enjoyed" the protection of the eleventh amendment, *Employees v. Department of Public Health & Welfare of Missouri*, 411 U.S. 279, 285, 93 S. Ct. 1614, 1618, 36 L.Ed.2d 251 (1973), the Court has said that it:

will find waiver only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction."

*Edelman v. Jordan*, 415 U.S. 651, 673, 94 S. Ct. 1347, 1360, 39 L.Ed.2d 662, *reh. denied*, 416 U.S. 1000, 94 S. Ct. 2414, 40 L.Ed.2d 777 (1974) (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171, 29 S. Ct. 458, 53 L.Ed. 742 (1909)). Accordingly, the Ninth Circuit has indicated that eleventh amendment immunity will be waived when [1] Congress has authorized suit against a class of defendants that includes states, and [2] the state enters into the activity regulated by federal law.

*Mills Music, Inc. v. Arizona*, 591 F. 2d 1278, 1283 (9th Cir. 1979) (Copyright Act).

We find that both prongs of the *Mills Music* test are satisfied in the instant case. Here, Congress conditioned the right to receive funds under the EAHCA on the state's amenability to suit in federal court. Section 1415(e)(2) provides that

[a]ny party aggrieved by the findings and decisions made under subsection (b) [providing for administrative review] ... shall have the right to bring a civil action ... in any State court of competent jurisdiction or in a district court of the United States ...

Since, inevitably, one of the parties to any EAHCA dispute will be a state agency, see 20 U.S.C. § 1412, this authorization clearly extends to suits against states. We therefore hold that the DOE consented to suit when it applied for and received federal funds under

20 U.S.C. § 1412. The State of Hawaii waived its eleventh amendment immunity and was amenable to suit by Katherine in federal court under the EAHCA.<sup>13</sup>

#### IV. Attorneys' Fees

Finally, we reverse the district court's award of attorneys' fees to appellees. While we recognize that the availability of attorneys' fees may be essential to enable many of the handicapped to avail themselves of statutory safeguards enacted for their benefit, we hold that appellees may not recover their fees under either of the statutes on which they rely: the Civil Rights Attorneys' Fees Award Act, 42 U.S.C. § 1988 (1976), or the Rehabilitation Act of 1973, 29 U.S.C. § 794a(b) (Supp. III 1979).

##### A. 42 U.S.C. § 1988

The Civil Rights Attorney's Fees Award Act, 42 U.S.C. § 1988, provides for an award of attorneys' fees only to those parties who prevail "in any action or proceeding to enforce a provision of section ... 1983 ... of this title."<sup>14</sup> We hold that appellees cannot recover under this provision because they cannot state a claim under 42 U.S.C. § 1983.

The Supreme Court has consistently indicated that the benefits of an action under 42 U.S.C. § 1983 are unavailable "where the governing statute provides an exclusive remedy for violation of its terms." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 28, 101 S. Ct. 1531, 1545, 67 L.Ed.2d 694 (1981) (citing *Maine v. Thiboutot*, 448 U.S. 1, 22n. 11, 100 S. Ct. 2502, 2513, n. 11, 65 L.Ed.2d 555 (1980) (Powell, J., dissenting)). Where Congress has provided a comprehensive enforcement and remedial scheme in enacting a regulatory statute, the Supreme Court has held, we must read the statute "to supplant any remedy that would otherwise be available under § 1983." *Middlesex County Sewerage Authority v. National Sea Clammers Assoc.*, 453 U.S. 1, 21, 101 S. Ct. 2615, 2627, 69 L.Ed.2d 435 (1981).

We hold that the complex provisions of section 1415 of the EAHCA, which establish detailed procedures for administrative and judicial review of the state's proposals to educate handicapped children, create a comprehensive and exclusive remedial scheme that precludes reliance upon a cause of action under section 1983. The Act evinces the "balance, completeness, and structural integrity" the Supreme Court has looked to in finding that a statute creates an exclusive remedial scheme. *Brown v. GSA*, 425 U.S. 820, 832, 96 S. Ct. 1961, 1967, 48 L.Ed.2d 402 (1976). See also *Smith v. Cumberland School Committee*, 703 F.2d 4, 8 (1st Cir. 1983) *cert. granted*, \_\_\_ U.S. \_\_\_, 104 S. Ct. 334, 78, L.Ed.2d 304 (U.S. 1983)\_ (No. 82-2120); *Anderson v. Thompson*, 658 F.2d 1205, 1216 (7th Cir. 1981) ("The EAHCA ... contains an elaborate administrative and judicial enforcement system."). Moreover, because money damages are not recoverable under the EAHCA absent exceptional circumstances, the remedies authorized by the two statutes are inconsistent. That is a strong indication that Congress did not intend to leave the section 1983 remedies available. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150-51 n. 5, 90 S. Ct. 1598, 104-05 n. 5, 26 L.Ed.2d 142 (1970); *Anderson*, 658 F.

2d at 1216-17. Consequently, appellees may not assert the section 1983 claim necessary to support a fees award under section 1988.<sup>15</sup>

B. 29 U.S.C. §794a(b)

We apply a similar analysis to find that appellees can assert no claim under the Rehabilitation Act of 1973, 29 U.S.C. § 794a(b), and thus cannot recover their attorneys' fees by reliance on its provisions. 29 U.S.C. § 794 provides in relevant part that "[n]o otherwise qualified handicapped individual ... shall, solely by reason of his handicap, be excluded from the participation in ... any program ... receiving Federal financial assistance."

Arguably, Katherine might have recovered under this provision had Congress not enacted the EAHCA to provide special education and health services for handicapped children. In the fact of the comprehensive remedial provisions of the EAHCA, however, we must conclude that Congress foreclosed persons complaining of conduct protected by the EAHCA from asserting claims under the Rehabilitation Act. As noted above, the EAHCA establishes detailed procedures for administrative review of states' proposals for educating handicapped children. If aggrieved parties could gain direct access to the courts merely by asserting claims under the Rehabilitation Act, the EAHCA's administrative review requirements could easily be circumvented. As in *Brown v. GSA*, 425 U.S. 820, 833, 96 S. Ct. 1961, 1968, 48 L.Ed.2d 402 (1976), Congress' "careful blend of administrative and judicial enforcement powers" compels a conclusion that other remedies are precluded. The Rehabilitation Act cannot be used to create an "end run" around the restrictions of the EAHCA and to gain remedies that would otherwise be unavailable. *Reineman v. Valley View Comm. School Dist.*, 527 F. Supp. 661, 665 (N.D. Ill. 1981), ("[plaintiffs could not recover damages under the Rehabilitation Act because they] cannot do indirectly via [the Rehabilitation Act] what *Anderson* teaches may not be done directly"); see also *Hines v. Pitt County Board of Education*, 497 F. Supp. 403 (E.D. N.C. 1980) (although plaintiff included cause of action under Rehabilitation Act, attorneys' fees under 29 U.S.C. § 794a(b) held unavailable because suit had been treated as arising under EAHCA throughout litigation).<sup>16</sup> Prohibiting reliance on the Rehabilitation Act in this case also accords with the long-established principle of statutory construction that a "precisely drawn, detailed statute preempts more general remedies." *Brown v. GSA*, 425 U.S. at 834, 96 S. Ct. at 1968. We thus hold that Katherine cannot recover attorneys' fees under section 794a(b) of the Rehabilitation Act.

In sum, we hold that Katherine prevailed in this litigation solely on the basis of her rights under the EAHCA, and that the comprehensive remedial provisions of that statute prevent her from recovering attorneys' fees under either 42 U.S.C. § 1983 or the Rehabilitation Act, 29 U.S.C. § 794a(b).

AFFIRMED in part and REVERSED in part.

REINHARDT, Circuit Judge, concurring in part and dissenting in part:

I dissent from the majority's rejection of the district court's finding that the Department of Education failed to offer Katherine a free appropriate public education for the 1981-82 school year. I cannot agree that the district court's finding in this regard was clearly erroneous. I concur in all other parts of Judge Norris's opinion.

The majority does not state clearly what it believes Katherine was required to show in the district court. Parts of the opinion indicate that reluctance on the part of the school's staff would be enough to render the school's plan unworkable, yet other parts suggest that only a showing of positive refusal to perform the required services would suffice.

I believe that under the circumstances the staff's reluctance to perform the required services rendered the plan inadequate for purposes of the EAHCA. Katherine's physician testified that delay by the school staff in performing the emergency services would have been life-threatening to Katherine and that a cooperative attitude on the part of the teachers was essential to the effectiveness of the emergency plan. The district court credited the physician's testimony with regard to these factual issues; we are not free to disregard it here. A plan involving such a risk to a child's life cannot be considered adequate.

The filing of a grievance petition by the teachers' union and the conversations overheard by the physician support a finding that at least part of the school's staff was reluctant to perform the services and justify an inference that there might have been hesitation or delay at the crucial moment. The district court's holding that the attitude of the school's personnel rendered the plan inadequate was therefore not clearly erroneous.

Moreover, Katherine's parents were not required to show conclusively that the teachers would have refused to perform the emergency services when necessary. The Act certainly does not require parents to risk their child's life pending a conclusive showing that essential services would not be provided. In life-and-death situations such as the one involved here, a reasonable doubt whether the services would be provided is enough to justify parents in refusing to enroll their children in a school.

The evidence presented here may reasonably have led Katherine's parents to doubt whether the school's staff would have provided the services when they were needed. Katherine's physician, who was responsible for training the teachers in the emergency procedures and who conducted an introductory training session, testified that the teachers were unwilling to perform the required services. His testimony was buttressed by the teacher's union filing of a grievance petition. Although that evidence does not compel a conclusion that the teachers would have refused to perform the services if put to the test, it is certainly sufficient to raise a reasonable doubt in one's mind on that point.

In short, the district court's finding that the staff's attitude rendered the plan inadequate was not clearly erroneous. Accordingly, I would affirm the district court's conclusion that the Department of Education did not offer Katherine a free appropriate public education for



the second year. Because the Department's prior EAHCA violation was not cured by the school's offer of the second plan, I would affirm the district court's award of damages for both years in accordance with our holding that, when exceptional circumstances are involved, the state must pay the cost of private school placement until an appropriate program is devised.

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- <sup>1</sup> The district judge did not make clear whether he intended to extend his order of reimbursement to cover both the 1980-81 and the 1981-82 school years. Because we hold that the DOE's 1981-82 IEP offered a "free appropriate public education," we need not reach the question whether an award of Katherine's school costs for that year would have been justified.
  - <sup>2</sup> We apply a de novo standard of review to the questions whether the DOE's IEPs constituted a "free appropriate public education" within the meaning of the EAHCA and whether the Act provides for an award of damages and attorneys' fees. Because those determinations require us to weigh the values underlying the statute in deciding the legal sufficiency of the DOE's offers -- we must, for instance, determine the weight to be assigned the explicit congressional preference that handicapped children be educated in classrooms with their peers, *see infra* p. 818 -- we treat them as questions of law. *Cf. Bonnette v. California Health and Welfare Agency*, 704 F. 2d 1465, 1468-69 (9th Cir. 1983) (whether state was "employer" within meaning of Fair Labor Standards Act treated as question of law).
  - <sup>3</sup> Although the administrative hearing officer was never asked to consider whether the DOE's IEP for the 1981-82 school year constituted a "free appropriate public education," we hold that it was proper for the district judge to decide that question when the case came before him. Because Congress "intended the courts to make independent program decisions based on a preponderance of the evidence," *Anderson v. Thompson*, 658 F. 2d 1205, 1208 (7th Cir. 1981) (affirming district court's consideration of plaintiff's then current educational requirements despite absence of prior administrative findings); *see* 20 U.S.C. § 1415(e)(2), the district court in this case was not hampered by the absence of administrative findings on Katherine's educational or health needs. *See also Doe v. Anrig*, 692 F. 2d 800, 805 (1st Cir. 1982) ("the review mechanism which the Act creates stands in sharp contrast to the usual situation where a court is confined to examining the record made before the agency"). Nor are the necessary findings so technical or specialized that the trial judge is less competent than the administrative hearing officer to make them de novo. As a matter of judicial efficiency, furthermore, it was sensible for the trial judge to consider the DOE's offers for both school years at the same time.
  - <sup>4</sup> The question whether the 1981-82 offer satisfied the statutory requirements is judged by an absolute, not a comparative, standard. As noted in text, *supra* p. 813, Katherine was entitled only to an appropriate, not to the best, education at public expense. It is thus irrelevant to our determine whether a placement at St. Philamena's would have been superior to a public school placement in 1981-82. Thus, the fortuitous circumstance of Mrs. D.'s presence at St. Philomena's is not a factor that we can consider in evaluating the DOE's 1981-82 proposal.

- <sup>5</sup> We apply the clearly erroneous standard of review to test the district court's factual finding that the school staff was unwilling to perform the required emergency health services for Katherine. As indicated in text, we do not accept this factual finding, even under the deferential standard of review we apply to it.
- <sup>6</sup> It is indisputable that even a lay person could have been trained to provide the services Katherine required. Indeed, Katherine's mother, who had no medical training, had performed them for some time.
- <sup>7</sup> The DOE also contends that appellees do not have standing to ask the court to award them the cost of Katherine's private schooling because, since the hearing officer decided in their favor, they are not "aggrieved parties" within the meaning of section 1415(e)(2). We reject this contention. Although the DOE relies on *Colin K. v. Schmidt*, 528 F. Supp. 355 (D. R.I. 1981), and *Scruggs v. Campbell*, 630 F. 2d 237 (4th Cir. 1980), to support its claim, both of these cases are distinguishable. *Colin K.* held only that a parent was no longer an "aggrieved party" when the state education agency agreed to satisfy the parent's claims after suit in federal court had begun. The court in *Scruggs* held that a plaintiff could not request review of an administrative determination under the Act simultaneously in both federal and state forums. Neither speaks to the facts of this case, in which the DOE to date has refused to enforce the hearing officer's order and in fact initiated this suit itself. In responding to the DOE's action with a counterclaim, appellees thus had standing to press enforcement of the hearing officer's decision.
- <sup>8</sup> The DOE contends only that the retroactive award of Katherine's tuition for the period pending resolution of the dispute over the IEP is impermissible under the EAHCA. As to any prospective relief, the statute provides that a state education agency must pay the costs of private schooling concurrently with the child's enrollment if the agency or a hearing officer determines that a private school program is the appropriate placement to meet EAHCA requirements. See 20 U.S.C. § 1413(a)(4)(B).
- <sup>9</sup> In *Mountain View-Los Altos Union High School Dist. v. Sharon B.H.*, 709 F. 2d 28 (9th Cir. 1983), we relied upon *Anderson* as an "extensive and well reasoned opinion," *id.* at 30, to support our conclusion that damages were inappropriate when the administrative assessment procedure preparatory to offering a placement for a handicapped child had not yet been completed. *Anderson* has also been cited with approval by other circuits. See, e.g., *Miener v. Missouri*, 673 F. 2d 969, 979 (8th Cir. 1982), *cert. denied*, \_\_\_ U.S. \_\_\_, 103 S. Ct. 215, 74 L.Ed.2d 171 (1982).
- <sup>10</sup> These "exceptional circumstances" are best described in the cases in which they were first held to exist. In *Tatro v. Texas*, 516 F. Supp. 968 (N.D. Tex. 1981), cited by the *Anderson* court to illustrate the first of its exceptions to the general rule, the court ordered reimbursement of private school tuition when the school district's offer to enroll a handicapped child in a public school program did not make provision for the "related health services" the district knew the child would need in order to attend. The court there indicated that "where...the parents cannot enroll the child [in the offered placement] without a risk of injury to the child because a school will not

provide a required related service [there, regular catherization], appropriate relief ought to include the cost of alternative sources of education and therapy." *Id.* at 978. In *Monahan v. Nebraska*, 491 F. Supp. 1074 (D. Neb. 1980), the case used in *Anderson* to illustrate the bad faith exception to the general rule, the court held that an award of the interim costs of private schooling was "appropriate" relief where the state's statutory procedures for review of placement offers did not comply with the requirements of the EAHCA. Also pointing to an administrative failure to follow prescribed procedures, the court in *Christopher T. v. San Francisco Unified School Dist.*, 553 F. Supp. 1107, 1121 (N.D. Cal. 1982), awarded plaintiffs reimbursement for residential placement of their child when the state education agency wilfully avoided taking responsibility for his education. Similarly, the court in *Boxall v. Sequoia Union High School Dist.*, 464 F. Supp. 1104 (N.D. Cal. 1979), awarded plaintiffs the cost of a home tutor for their autistic child after the local school district refused to follow the recommendation of every other state agency consulted that individualized supervision for the child be provided.

- 11 Unlike the plaintiff in *Tatro*, Katherine was not physically incapable of accepting the DOE's offer for the 1980-81 school year. The DOE failed to provide her not with essential health services but rather with an adequate educational program in a classroom with her peers. *See infra* p. 818. Nor is the DOE guilty of the kind of procedural bad faith implicitly recognized as a basis for an award of damages in *Monahan*, *Christopher T.* and *Boxall*: The DOE was following the procedural safeguards of the EAHCA in pursuing administrative and judicial review of its placement offer.
- 12 The eleventh amendment is not by its terms applicable to suits brought against a state by its own citizens. Nonetheless, "it is established that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Employees v. Department of Public Health and Welfare*, 411 U.S. 279, 280, 93 S. Ct. 1614, 1615, 36 L.Ed.2d 251 (1973) (citations omitted).
- 13 Because we find that the DOE waived its eleventh amendment rights by consenting to the terms of the EAHCA, we do not reach the appellees' contentions that the immunity could also have been waived by the DOE's initiation of this suit, by the state's passage of its own tort claims act, or by Congress' authority to abrogate eleventh amendment immunity if it passes legislation under § 5 of the fourteenth amendment.
- 14 The parties do not claim that any of the other statutory provisions to which 42 U.S.C. § 1988 is applicable is implicated in this case.
- 15 Nor can Katherine assert a viable cause of action under § 1983 by relying on a claim that her right to equal protection was violated by the DOE's failure to offer her an adequate educational program. It is clear that where adequate alternative remedies remain available Congress may abrogate a statutory means for the enforcement of constitutional rights. The comprehensive nature of the remedies laid out in the EAHCA evinces a congressional intent to preclude reliance on either a statutory or a constitutional cause of action under § 1983. It is arguable that where adequate alternative remedies for the vindication of constitutional rights are unavailable, Congress may

not abrogate existing statutory means of enforcement. *See* Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362 (1953). *Cf. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L.Ed.2d 619 (1971) (despite absence of statutory authorization, money damages available to compensate victims of fourth amendments violations). Appellees do not argue, however, that the EAHCA remedies are constitutionally inadequate. Thus, we do not reach the question.

<sup>16</sup> Some district courts have held that attorneys' fees under the Rehabilitation Act will be available even in cases in which the prevailing party has relied primarily on the EAHCA to support his substantive claims. *See e.g., Patsel v. District of Columbia Board of Education*, 530 F. Supp. 660 (D. D.C. 1982); *Campbell v. Talladega County Board of Education*, 518 F. Supp. 47 (N.D. Ala. 1981); *Tatro v. Texas*, 516 F. Supp. 968 (N.D. Tex. 1981). For the reasons given in the text, we cannot accept those courts' holdings. *See supra* p. 819-820.